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# HAMMON ON EVIDENCE

COVERING

BURDEN OF PROOF, PRESUMPTIONS, JUDICIAL  
NOTICE, JUDICIAL ADMISSIONS,  
AND ESTOPPEL

BY

LOUIS L. HAMMON

AUTHOR OF "A TREATISE ON CONTRACTS," ETC.

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## PREFACE.

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Those rules which are commonly regarded by the legal profession as belonging to the law of evidence may be divided into five grand divisions, viz.:

I. Rules Relating to the Right or the Necessity of Adducing Evidence.

II. Rules Defining the Means of Proof.

III. Rules Determining the Admissibility of Evidence.

IV. Rules Relating to the Production of Evidence.

V. Rules Determining the Weight of Evidence.

I. Right or Necessity of Adducing Evidence. These rules form the subject of this volume, and are referred to in a later place in the preface.

II. Means of Proof. The means by which a given fact may be proved are three, viz.: (1) The material thing whose existence or condition is in dispute. This is commonly termed "real or demonstrative evidence," and is more aptly described, perhaps, as "judicial inspection." (2) Documents constituting a memorial or containing a recital of the fact in dispute. This is known as "documentary evidence." It may be observed in this connection that when the existence or condition of the document itself is in dispute, and the writing is introduced to settle the question, the document becomes an instrument of real or demonstrative evidence, and may be termed "documentary evidence" only in a broad sense of the term. It is only when the document evidences an extraneous fact in dispute that it constitutes documentary evidence in the narrower sense in which that term is used in distinguishing the three means of proof. (3) Persons who give testimony, direct or indirect, of the existence of the fact in dispute. This is "testimonial evidence," and as a means of proof it is governed by those rules which determine the competency or prescribe the qualifications of a person to testify as a witness.

III. Admissibility of Evidence. Anything that tends to prove the existence of the fact in issue is admissible for that purpose, in the absence of some rule to the contrary. These rules to the contrary form the bulk of this division of the law of evidence. Rules of admissibility and exclusion include, among others, those relating to the relevancy of evidence; the rule against hearsay, and its exceptions; rules of primary and secondary evidence, or the so-called "best-evidence rule"; the parol evidence rule, etc.

IV. Production of Evidence. The rules falling under this head relate to practice, rather than evidence. They prescribe the mode in which a proponent may adduce evidence within his control, and in which he may compel the production, for his benefit, of evidence not within his control. They thus include the rules for the attendance and examination of witnesses, rules for physical examination and view, rules for the production of documents, and rules for discovery.

V. Weight of Evidence. Evidence must be of a certain weight to constitute proof. It must, in all cases, be sufficient to produce conviction in the minds of the court or the jury of the existence of the fact in dispute. The degree of evidence required thus to produce conviction differs in civil and criminal cases, and in some classes of cases it must be of a peculiar quality. These rules form the last of the grand divisions of the law of evidence.

This volume is concerned with the first grand division only, viz.: The Right or The Necessity of Adducing Evidence. The rules falling under this head may be divided into four chapters, viz.:

- I. Burden of Proof and Presumptions.
- II. Judicial Notice.
- III. Judicial Admissions.
- IV. Estoppel.

I. Burden of Proof and Presumptions. These two conceptions are closely related. An adequate presentation of the rules governing the burden of proof in a given topic of the law—such,



for example, as negligence—cannot be made without presenting also the rules of presumption prevailing there, and vice versa. This connection exists even in theory. While the theory of burden of proof may be explained without reference to presumptions, an explanation of the theory of presumptions cannot possibly be made without reference to burden of proof. For this reason these matters are considered in one chapter.

There is much confusion in the law relating to burden of proof and presumptions. For the most part, however, it is due to a lack of discrimination and a want of uniformity in the use of terms, rather than to ignorance of the nature, operation, and effect of the conceptions which those terms are employed to denote. With the decisions themselves there is no more fault to be found in this branch of the law, perhaps, than in many others; but the terms in which those decisions are expressed, and the processes of reasoning by which they are reached, present a degree of inaccuracy and inconsistency not elsewhere exceeded. This being the case, the author, while chary of "meddling" with the law, has been compelled of necessity to fix upon a terminology, and to construe and classify the cases according to the legal effect which they give to the conceptions which his chosen terms denote, rather than according to the varying terms which the different courts employ to denote those conceptions; otherwise, this book would serve only to perpetuate the existing confusion, rather than to dispel it. It seems to the author that this treatment of the cases has yielded some degree of success. Much apparent conflict has been done away with. Cases on their face in discord have been found in legal effect to be in harmony. At the same time, it is not to be expected that with such material there should be a unanimous opinion as to the results attained. Many cases, from their obscurity or ambiguity, are susceptible of conflicting interpretations. Yet it is the author's belief that a careful reading of the cases according to their strict effect as precedents, rather than according to the terms in which they are expressed, will subject his conclusions to comparatively little criticism.

Apart from bringing some degree of harmony out of much confusion, the particular feature of this chapter is thought to consist in the absence from its pages of many misstatements concerning the nature, operation, and effect of burden of proof and presumptions in which the literature of those subjects abounds. Few direct references to these errors will be found in the following pages. It has been thought sufficient to state what the law is, not what it is not.

II. Judicial Notice. The principles of judicial notice, although fairly well settled, are none the less important, and they have been more fully discussed in these pages, both in theory and in application, than in any previous work dealing with the subject of evidence.

III. Judicial Admissions. In strict propriety, "evidence" of a fact is that which tends to prove it, directly or by inference. By this test, judicial admissions are not evidence; on the contrary, they affect merely the right or the necessity of adducing evidence, and are thus distinguished from nonjudicial admissions, which constitute evidence of the fact admitted. They are accordingly separated from the latter in treatment.

IV. Estoppel. The various forms of estoppel have customarily been treated in works on evidence. Properly speaking, however, they rest on principles of substantive law, and their only relation to the law of evidence is their more or less remote effect on the right or the necessity of adducing evidence concerning the fact as to which the estoppel exists. The general recognition of this truth has led the author to deal with them but briefly.

In closing this preface, acknowledgment should be made of aid derived from the fruits of the labors of the late Professor J. B. Thayer, whose investigations have done so much to dispel the obscurity and confusion surrounding the law of evidence; also, in a lesser measure, to Professor John H. Wigmore; and Mr. Herbert T. Tiffany is entitled to mention for help derived from his admirable work on Real Property in reference to the so-called presumption of lost grants.

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and the latter sort includes that form of circumstantial evidence known as "presumptions of fact."<sup>14</sup> It is elsewhere shown that the substantial difference between presumptions of law and of fact is that the former are not assumptions, but mere inferences drawn from evidentiary facts, while the latter are not inferences, but more or less arbitrary assumptions sanctioned by rules of law.<sup>15</sup> Whether a presumption of law shall be indulged is a question for the court, regardless of the opinion of the jury as to the actual existence of the assumed fact. Whether a presumption of fact shall be drawn is a question for the jury, unhampered by the opinion of the court.

The only presumptions, therefore, that are embraced in evidence sufficient, and merely sufficient, to take the case to the jury, are presumptions of fact,—that is, such as the jury may or may not indulge, in their discretion; not such as they must indulge by direction of the court, regardless of their own opinion.

**(b) Discharge and shifting of burden of adducing evidence.** When the proponent has introduced evidence sufficient, and only sufficient, to take the case to the jury, he has discharged the burden of adducing evidence which rested on him in the beginning, and he may therefore rest his case. The burden of proof still rests upon him, however, and, in order to win his case, he must, after all the evidence is in, convince the jury of the existence of the facts on which he rests his right to relief.

While the proponent, by introducing evidence sufficient, and only sufficient, to take the case to the jury, discharges the burden of adducing evidence which has theretofore rested on

<sup>14</sup> It follows that the presumption will support a verdict unfavorable to the party against whom it operates. *State v. Fox*, 80 Iowa, 312, 20 A. S. R. 425; *Com. v. York*, 9 Metc. (Mass.) 93, 43 A. D. 373; *Green v. State*, 28 Miss. 687.

<sup>15</sup> Sections 11-14, *infra*.

him, he does not thereby shift that burden to the shoulders of his opponent.<sup>16</sup> The opponent is not required to go forward with the trial by adducing evidence in denial or in avoidance of the proponent's case, since, under the circumstances assumed, the proponent has not made a *prima facie* case. The only effect of the opponent's failure to adduce such evidence is the risk he runs that the jury may believe the proponent's evidence, and bring in a verdict for him.<sup>17</sup>

**§ 4. *Prima facie* case—Province of court and of jury.**

Where a proponent, i. e., the party having the burden of proof in its proper sense, also bears the burden of commencing the trial by adducing evidence tending to prove his case, the least that he can do with success, it has just been seen, is to adduce evidence sufficient, and merely sufficient, to take the case to the jury. He may, and often does, however, do more. He may adduce evidence in such quantity or of such quality that the jury, as reasonable men, would be required to find a verdict in his favor. His evidence may be so full and satisfactory that but one conclusion would be justified, so that the court, if a verdict were found against him, would be compelled to set it aside, on motion for new trial, as contrary to the evidence. In this event the proponent's evidence is not only sufficient to take the case to the jury; it carries the case past the jury, so to speak, and places it again in the hands of the court. Unless, therefore, the opponent has evidence to offer by way of denial or avoidance, the court must peremptorily instruct the jury to find for the proponent.<sup>18</sup> By adducing evidence, whether direct or indirect, which thus

<sup>16</sup> *Klein v. German Nat. Bank*, 69 Ark. 140, 86 A. S. R. 183; *People v. Finley*, 38 Mich. 482, 485.

<sup>17</sup> See cases cited in note 13, *supra*.

<sup>18</sup> *Schaefer v. St. L. & S. R. Co.*, 128 Mo. 64, 72. And see *Angelo v. People*, 96 Ill. 209, 36 A. R. 132.

requires a verdict in his favor, the proponent is said to make a "prima facie case." By this term, evidence requiring a verdict for the proponent may conveniently be distinguished from evidence which is merely sufficient to take the case to the jury.<sup>19</sup>

(a) **Nature of evidence—Presumptions.** A prima facie case, i. e., evidence requiring a verdict for the proponent, may consist of either direct or indirect evidence, and the latter sort may be said to include an important outgrowth from it, namely, presumptions of law. If a proponent adduces evidence of facts giving rise to a presumption of law in his favor, then the burden of overcoming the presumption—that is, the burden of adducing evidence to the contrary—is cast on the opponent, and, unless he discharges this burden by adducing evidence which tends to overthrow the presumption, the case will be disposed of by the court as a matter of law in favor of the proponent.<sup>20</sup>

<sup>19</sup> *Abrath v. N. E. R. Co.*, 11 Q. B. Div. 440, 456, *Thayer, Cas. Ev.* 78, 80; *Banbury Peerage Case*, 1 Sim. & S. 153, *Thayer, Cas. Ev.* 45; *St. Louis, I. M. & S. R. Co. v. Taylor*, 57 Ark. 136; *Metropolitan St. R. Co. v. Powell*, 89 Ga. 601; *Graves v. Colwell*, 90 Ill. 612; *Young v. Miller*, 145 Ind. 652; *Wilder v. Cowles*, 100 Mass. 487, 488; *Burnham v. Allen*, 1 Gray (Mass.) 496, 500; *Broult v. Hanson*, 158 Mass. 17; *Crowninshield v. Crowninshield*, 2 Gray (Mass.) 524, *Thayer, Cas. Ev.* 100, 104; *Jones v. Stevens*, 5 Metc. (Mass.) 373, 378; *Cent. Bridge Corp. v. Butler*, 2 Gray (Mass.) 130, 131; *Smith v. Burrus*, 106 Mo. 94, 27 A. S. R. 329; *Shepardson v. Perkins*, 60 N. H. 76; *Farmers' L. & T. Co. v. Siefke*, 144 N. Y. 354, 359.

Evidence which is merely sufficient to take the case to the jury has sometimes been termed "prima facie evidence," to distinguish it from evidence which is merely admissible, and not sufficient to take the case to the jury; but this is not the general use of the term. See note 8, *supra*.

<sup>20</sup> *Thayer, Prel. Treat. Ev.* 380, 383; *Williams v. East India Co.*, 3 East, 192, 199; *Pickup v. Thames & M. Ins. Co.*, 3 Q. B. Div. 594, *Thayer, Cas. Ev.* 106, 109; *Agnew v. U. S.*, 165 U. S. 36, 50; *State v. Hoyt*, 47 Conn. 518, 541; *State v. Lee*, 69 Conn. 186; *Donahue v. Coleman*, 49 Conn. 464; *Metropolitan St. R. Co. v. Powell*, 89 Ga. 601; *Graves v. Colwell*, 90 Ill.



If the presumption is a conclusive one, the only way in which the opponent can overcome it is to adduce evidence in disproof of the facts upon which it is founded. If, however, the presumption is a disputable one, then it may be dispelled by evidence in denial of the fact assumed, as well as in denial of the facts giving rise to the presumption.

It is to be observed that the only presumptions that make a *prima facie* case are presumptions of law, since, as has been seen, presumptions of fact are mere inferences which the jury may or may not draw, as to them seems proper.<sup>21</sup>

A *prima facie* case exists in its most pronounced form in the presumption of law, but this is only one of its forms. It may exist as well in direct evidence, or in a general mass of circumstantial evidence not giving rise to a legal presumption, and in this event the effect is the same; the burden of adducing evidence to the contrary is cast on the opponent, and, unless he discharges that burden, the court is bound to direct a verdict for the proponent.<sup>22</sup>

612; *Angelo v. People*, 96 Ill. 209, 36 A. R. 132; *Louisville, N. A. & C. R. Co. v. Thompson*, 107 Ind. 442, 57 A. R. 120, 122; *Jones v. Granite State F. Ins. Co.*, 90 Me. 40; *Market & F. Nat. Bank v. Sargent*, 85 Me. 349, 35 A. S. R. 376; *Com. v. Eddy*, 7 Gray (Mass.) 583; *Powers v. Russell*, 13 Pick. (Mass.) 69, 76, *Thayer, Cas. Ev.* 74; *Crowninshield v. Crowninshield*, 2 Gray (Mass.) 524, *Thayer, Cas. Ev.* 100, 105; *People v. Garbutt*, 17 Mich. 9, 97 A. D. 162, 169; *Yarnell v. Moore*, 3 Coldw. (Tenn.) 173.

It is otherwise in criminal cases in New York. *People v. Cannon*, 139 N. Y. 32, 36 A. S. R. 668, *Thayer, Cas. Ev.* 92.

A presumption constitutes *prima facie* evidence of a fact which has been pleaded, the same as of a fact not pleaded. *Ritchie v. Carpenter*, 2 Wash. St. 512, 26 A. S. R. 877.

<sup>21</sup> Sections 3(a), *supra*, and 12-14, *infra*.

<sup>22</sup> *Union Pac. R. Co. v. McDonald*, 152 U. S. 262; *Mugler v. Kansas*, 123 U. S. 623, 674; *Morrow Shoe Mfg. Co. v. N. E. Shoe Co.*, 18 U. S. App. 256, 616, 24 L. R. A. 417; *Wilcox v. Henderson*, 64 Ala. 535; *McCormick v. Holmes*, 41 Kan. 265; *Delano v. Bartlett*, 6 Cush. (Mass.) 364, 367; *Hemingway v. State*, 68 Miss. 371; *Shepardson v. Perkins*, 60

(b) **Discharge and shifting of burden of convincing jury and burden of adducing evidence.** When a prima facie case has been made,—that is, when evidence requiring a verdict for the proponent has been introduced, and nothing is offered in rebuttal,—the burden of proof in its proper sense does not come into operation, since it is the duty of the court to dispose of the case by directing a verdict for the proponent; consequently, in these circumstances, the burden of proof is not discharged, nor is it shifted to the opponent.

With regard to the burden of adducing evidence, however, the law is different. When a prima facie case has been made, the proponent has not only discharged the burden of adduction; he has gone further and shifted it to his opponent. If the opponent would win, he must therefore go forward with the trial and adduce evidence in denial or in avoidance of the case made by the proponent. If he does not do this, the court is bound to direct a verdict against him. If, however, he does discharge the burden of adduction by offering such evidence, then the proponent's prima facie case is dispelled, and the truth of the fact in issue is to be determined by the jury on all the evidence.

When the burden of adduction is thus cast on the opponent, he stands in the same position with reference to it as the proponent stood in when the burden rested on him, and the future process is the same. First, then, the opponent must adduce sufficient evidence in rebuttal to take his case to the jury. Whether or not the burden of adduction has been discharged by the opponent at any given stage in the proceedings—that is, whether or not sufficient evidence has been adduced to take his case to the jury—is a question addressed to the court. If the court deems the opponent's evidence

N. H. 76, 83; *Eaton v. Alger*, 47 N. Y. 345, 351. *Contra*, *Anniston Nat. Bank v. School Committee*, 121 N. C. 107 (statute).

insufficient to justify a reasonable man in believing in his contention, so that a verdict in his favor would be unwarranted by the evidence, then the court is bound to direct a verdict in favor of the proponent. If, on the other hand, the court deems the opponent's evidence sufficient to justify a verdict for him, then the burden of adduction resting on him has been discharged, and the court must submit the case to the jury for them to determine under all the evidence. Such is the law where the opponent does no more than to adduce evidence sufficient to take his case to the jury; and it is to be observed that in this case the burden of adduction does not shift back to the proponent.

The opponent may, however, go further. He may adduce evidence which is not only sufficient to take his case to the jury, but of such force as to require a verdict in his favor, in the absence of evidence in surrebuttal. In this event the decision of the case becomes a question for the court for the time being, and, unless the proponent adduces evidence in denial or in avoidance of the opponent's case, the court is bound to instruct the jury peremptorily to return a verdict for the opponent. By making a *prima facie* case, therefore, the opponent not only discharges the burden of adduction resting on him, but shifts it to the shoulders of the proponent, who must accordingly, if he would win, go forward with the evidence.<sup>23</sup>

Whether or not the burden of adduction shall shift at all depends upon the weight of the evidence adduced. So often as it shifts, just so often must it be met and discharged, if the party on whom it rests would win his case. So long as a party does no more than to adduce evidence which is merely sufficient to take the case to the jury, the burden of adduction

<sup>23</sup> *Angelo v. People*, 96 Ill. 209, 36 A. R. 132.

does not shift;<sup>24</sup> but the moment he goes further, and adduces evidence which not only justifies but requires a verdict in his favor, then the burden of adduction is shifted to the other party, who must accordingly dispel the case so made against him.<sup>25</sup>

<sup>24</sup> Section 3(b), *supra*.

<sup>25</sup> ENGLAND: *Pickup v. T. & M. M. Ins. Co.*, 3 Q. B. Div. 594, *Thayer, Cas. Ev.* 106, 109; *Abrath v. N. E. R. Co.*, 11 Q. B. Div. 440, *Thayer, Cas. Ev.* 78.

UNITED STATES: *Smith v. Sac County*, 11 Wall. 139; *Morrow Shoe Mfg. Co. v. N. E. Shoe Co.*, 18 U. S. App. 256, 616, 24 L. R. A. 417; *The Bronx*, 86 Fed. 808; *Agnew v. U. S.*, 165 U. S. 36, 50; *Jones v. Simpson*, 116 U. S. 609; *Empire Transp. Co. v. Phila. & R. C. & I. Co.*, 40 U. S. App. 157, 35 L. R. A. 623.

ALABAMA: *Willcox v. Henderson*, 64 Ala. 535.

ARKANSAS: *St. Louis, I. M. & S. R. Co. v. Taylor*, 57 Ark. 136.

CALIFORNIA: *Scott v. Wood*, 81 Cal. 398, 401.

CONNECTICUT: *Pease v. Cole*, 53 Conn. 53, 55 A. R. 53, 64; *State v. Lee*, 69 Conn. 186, 197; *Baxter v. Camp*, 71 Conn. 245, 71 A. S. R. 169.

GEORGIA: *Metropolitan St. R. Co. v. Powell*, 89 Ga. 601.

ILLINOIS: *Kitner v. Whitlock*, 88 Ill. 513; *Egbers v. Egbers*, 177 Ill. 82; *Graves v. Colwell*, 90 Ill. 612.

KENTUCKY: *Howat v. Howat's Ex'r*, 19 Ky. L. R. 756, 41 S. W. 771.

MAINE: *Woodcock v. Calais*, 68 Me. 244.

MASSACHUSETTS: *Powers v. Russell*, 13 Pick. 69, *Thayer, Cas. Ev.* 74, 75; *Jones v. Stevens*, 5 Metc. 373, 378; *Burnham v. Allen*, 1 Gray, 496, 501; *Spaulding v. Hood*, 8 Cush. 602, 606.

MICHIGAN: *Walker v. Detroit Transit R. Co.*, 47 Mich. 338.

MISSISSIPPI: *Hemingway v. State*, 68 Miss. 371.

MISSOURI: *Schaefer v. St. L. & S. R. Co.*, 128 Mo. 64; *Gay v. Gillilan*, 92 Mo. 250, 1 A. S. R. 712, 719.

NEW JERSEY: *Adoue v. Spencer*, 62 N. J. Eq. 782, 56 L. R. A. 817.

NEW YORK: *Heinemann v. Heard*, 62 N. Y. 448, 455; *Isham v. Post*, 141 N. Y. 100, 38 A. S. R. 766; *Farmers' L. & T. Co. v. Siefke*, 144 N. Y. 354, 359; *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282.

PENNSYLVANIA: *Com. v. Gerade*, 145 Pa. 289, 27 A. S. R. 689.

TENNESSEE: *Yarnell v. Moore*, 3 Coldw. 173.

TEXAS: *Clark v. Hills*, 67 Tex. 141; *Smith v. Gillum*, 80 Tex. 120; *Holder v. State*, 35 Tex. Cr. App. 19.

WEST VIRGINIA: *Butler v. Thompson*, 45 W. Va. 660, 72 A. S. R. 838.

This process continues until all the evidence is in; that is, until the trial comes to a close either by the failure of one party or the other to discharge the burden of adduction resting for the time on him, or by one party or the other having discharged the burden by adducing evidence, not such as to require a verdict in his favor, but merely sufficient to justify such a verdict. When this stage is reached, the burden of adduction disappears and is heard of no more. But the burden of proof, in its proper sense, still exists, and operates still against the same party who was charged with it in the beginning, requiring him, in order to win, to convince the jury of the truth of his contentions by means of the entire body of evidence before them.<sup>26</sup> If, therefore, the evidence as to the

<sup>26</sup> ENGLAND: *Pickup v. T. & M. M. Ins. Co.*, 3 Q. B. Div. 594, *Thayer, Cas. Ev.* 106, 109; *Sutton v. Sadler*, 3 C. B. (N. S.) 87, *Thayer, Cas. Ev.* 97; *Abrath v. N. E. R. Co.*, 11 Q. B. Div. 440, *Thayer, Cas. Ev.* 78.

UNITED STATES: *The Bronx*, 86 Fed. 808.

CALIFORNIA: *Scott v. Wood*, 81 Cal. 398.

CONNECTICUT: *In re Barber's Estate*, 63 Conn. 393, 22 L. R. A. 90, 95; *Pease v. Cole*, 53 Conn. 53, 55 A. R. 53, 63; *Baxter v. Camp*, 71 Conn. 245, 71 A. S. R. 169.

ILLINOIS: *Egbers v. Egbers*, 177 Ill. 82; *Gizler v. Witzel*, 82 Ill. 322.

INDIANA: *Young v. Miller*, 145 Ind. 652.

MAINE: *Jones v. Granite State F. Ins. Co.*, 90 Me. 40; *Woodcock v. Calais*, 68 Me. 244; *Buswell v. Fuller*, 89 Me. 600, 602.

MASSACHUSETTS: *Huntington v. Shute*, 180 Mass. 371, 91 A. S. R. 309; *Morgan v. Morse*, 13 Gray, 150; *Spaulding v. Hood*, 8 Cush. 602, 606; *Wright v. Wright*, 139 Mass. 177; *Starratt v. Mullen*, 148 Mass. 570; *Phipps v. Mahon*, 141 Mass. 471; *Blanchard v. Young*, 11 Cush. 341; *Willett v. Rich*, 142 Mass. 356, 56 A. R. 684, 687; *Powers v. Russell*, 13 Pick. 69, *Thayer, Cas. Ev.* 74; *Simpson v. Davis*, 119 Mass. 269, 20 A. R. 324; *Delano v. Bartlett*, 6 Cush. 364; *Gibson v. International Trust Co.*, 177 Mass. 100, 52 L. R. A. 928, 929; *Broult v. Hanson*, 158 Mass. 17; *Crowninshield v. Crowninshield*, 2 Gray, 524, *Thayer, Cas. Ev.* 100; *Nichols v. Munsel*, 115 Mass. 567; *Central Bridge Corp. v. Butler*, 2 Gray, 130, 132; *Gay v. Bates*, 99 Mass. 263.

MISSOURI: *Dowell v. Guthrie*, 99 Mo. 653, 17 A. S. R. 598; *Schaefer v. St. L. & S. R. Co.*, 128 Mo. 64, 71.

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disputed facts is evenly balanced, so that the jury are in doubt as to the truth of the matter, the proponent has failed to discharge the burden of proof, and the jury must find against him.<sup>27</sup>

#### C. RIGHT TO OPEN AND CLOSE.

§ 5. In the absence of some statute or some rule of practice

NEW HAMPSHIRE: *Shepardson v. Perkins*, 60 N. H. 76.

NEW YORK: *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282; *Blunt v. Barrett*, 124 N. Y. 117; *Kay v. Metropolitan St. R. Co.*, 163 N. Y. 447; *Farmers' L. & T. Co. v. Siefke*, 144 N. Y. 354; *Heinemann v. Heard*, 62 N. Y. 448.

RHODE ISLAND: *Sweeney v. Metropolitan Life Ins. Co.*, 19 R. I. 171, 61 A. S. R. 751.

TENNESSEE: *East Tenn., V. & G. R. Co. v. Stewart*, 13 Lea, 432, 438.

TEXAS: *Jester v. Steiner*, 86 Tex. 415, 419; *Clark v. Hills*, 67 Tex. 141.

VERMONT: *Williams v. Robinson*, 42 Vt. 658, 1 A. R. 359, 362.

WISCONSIN: *Atkinson v. Goodrich Transp. Co.*, 69 Wis. 5.

See, also, note 3, *supra*.

The rule is the same in criminal cases. Section 49(a), *infra*.

<sup>27</sup> *Thayer, Prel. Treat. Ev.* 369.

ENGLAND: *Abrath v. N. E. R. Co.*, 11 Q. B. Div. 440, *Thayer, Cas. Ev.* 78; *Hingston v. Kelly*, 18 L. J. Exch. 360, *Thayer, Cas. Ev.* 76.

ALABAMA: *Birmingham Union R. Co. v. Hale*, 90 Ala. 8, 24 A. S. R. 748; *Lehman v. McQueen*, 65 Ala. 570; *Wilcox v. Henderson*, 64 Ala. 535.

CALIFORNIA: *Pendleton v. Cline*, 85 Cal. 142.

ILLINOIS: *Watt v. Kirby*, 15 Ill. 200.

INDIAN TERRITORY: *Robinson v. Nail*, 2 Ind. T. 509.

INDIANA: *Young v. Miller*, 145 Ind. 652, 656.

IOWA: *Oaks v. Harrison*, 24 Iowa, 179.

MAINE: *Jones v. Granite State F. Ins. Co.*, 90 Me. 40.

MASSACHUSETTS: *Burnham v. Allen*, 1 Gray, 496, 501; *Broult v. Hanson*, 158 Mass. 17.

NEBRASKA: *Fremont, E. & M. V. R. Co. v. Harlin*, 50 Neb. 698, 61 A. S. R. 578.

NEW HAMPSHIRE: *Lisbon v. Lyman*, 49 N. H. 553, 563.

NEW YORK: *Rogers v. Traders' Ins. Co.*, 6 Paige, 583.

PENNSYLVANIA: *Kaine v. Welgley*, 22 Pa. 179, 184.

TEXAS: *Mexican Cent. R. Co. v. Lauricella*, 87 Tex. 277, 47 A. S. R. 103.

to the contrary,<sup>28</sup> the burden of proof, in the proper sense of the term, carries with it the incidental right to begin and reply. The proponent—that is, the party who has the burden of convincing the jury of the facts on which he rests his right to relief—has the right to open and close the case by way of adducing evidence and argument in support of his demands.<sup>29</sup>

<sup>28</sup> In Massachusetts the plaintiff has the right to open and to close, regardless of the issues and of the burden of proof proper. *Hurley v. O'Sullivan*, 137 Mass. 86; *Dorr v. Tremont Nat. Bank*, 128 Mass. 349, 358; *Page v. Osgood*, 2 Gray, 260; *Robinson v. Hitchcock*, 8 Metc. 64, 66.

In some states the right to open and close rests with the party who would lose if no evidence were given on either side. *Dille v. Lovell*, 37 Ohio St. 415. This rule was doubtless adopted on the theory that the question of which party would lose if no evidence at all were given affords a test for determining the party who has the burden of proof in its proper sense of burden of convincing. The fallacy of this supposition is elsewhere shown. Section 9, *infra*.

See, generally, 7 Current Law, 257.

<sup>29</sup> ENGLAND: *Doe d. Worcester Trustees v. Rowlands*, 9 Car. & P. 734; *Ashby v. Bates*, 15 Mees. & W. 589; *Geach v. Ingall*, 14 Mees. & W. 95; *Huckman v. Fernie*, 3 Mees. & W. 505, 514, 517; *Stormont v. Waterloo L. & C. Assur. Co.*, 1 Fost. & F. 22; *Leete v. Gresham Life Ins. Soc.*, 7 Eng. Law & Eq. 578, 15 Jur. 1161; *Amos v. Hughes*, 1 Moody & R. 464.

UNITED STATES: *Cheesman v. Hart*, 42 Fed. 98.

ARKANSAS: *St. Louis, I. M. & S. R. Co. v. Taylor*, 57 Ark. 136.

CONNECTICUT: *Livingston's Appeal*, 63 Conn. 68, 71; *Scott v. Hull*, 8 Conn. 296; *Comstock v. Hadlyme Ec. Soc.*, 8 Conn. 254, 20 A. D. 100.

GEORGIA: *Ransone v. Christian*, 56 Ga. 351; *Evans v. Arnold*, 52 Ga. 169.

ILLINOIS: *Carpenter v. First Nat. Bank*, 119 Ill. 352; *Harp v. Parr*, 168 Ill. 459, 477; *Rigg v. Wilton*, 13 Ill. 15, 54 A. D. 419.

INDIANA: *Wright v. Abbott*, 85 Ind. 154; *Rothrock v. Perkinson*, 61 Ind. 39; *Hellman v. Shanklin*, 60 Ind. 424; *Kent v. White*, 27 Ind. 390, 392; *Stayner v. Joyce*, 120 Ind. 99.

KANSAS: *Baughman v. Baughman*, 32 Kan. 538; *Stith v. Fullinwider*, 40 Kan. 73.

KENTUCKY: *Crabtree v. Atchison*, 93 Ky. 338; *American Acc. Co. v. Reigart*, 94 Ky. 547, 42 A. S. R. 374; *Lieb v. Craddock*, 87 Ky. 525; *Royal Ins. Co. v. Schwing*, 87 Ky. 410.

MICHIGAN: *Taff v. Hosmer*, 14 Mich. 309.



## D. MEASURE OF EVIDENCE.

§ 6. Brief attention may be given rules concerning the measure, quantity, or degree of evidence required by law to persuade the jury of the existence of the facts on which the proponent rests his right to judgment. Though closely allied with burden of proof in the proper sense of that term, measure of evidence is a separate and distinct idea. Rules as to burden of proof determine which party rests under the necessity of convincing the jury of the existence of the facts on which he bases his right to relief. Rules as to measure of evidence determine the amount or degree of evidence which that party must adduce in order to satisfy and discharge the burden of proof. The one, therefore, relates to the necessity of adducing evidence as a means of establishing asserted facts, while the other relates to the sufficiency of the evidence thus adduced.

(a) **Criminal cases.** In criminal cases the state is charged with the burden of persuading the jury of the prisoner's guilt beyond a reasonable doubt, as the phrase goes.<sup>30</sup> The rule

MISSOURI: *Tingley v. Cowgill*, 48 Mo. 291; *Bates v. Forcht*, 89 Mo. 121.

NEBRASKA: *Seebrook v. Fedawa*, 30 Neb. 424; *Olds Wagon Co. v. Benedict*, 25 Neb. 372.

NEW HAMPSHIRE: *Hardy v. Merrill*, 56 N. H. 227, 22 A. R. 441; *Probate Judge v. Stone*, 44 N. H. 593; *Seavy v. Dearborn*, 19 N. H. 351.

NEW YORK: *Murray v. N. Y. Life Ins. Co.*, 85 N. Y. 236; *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278.

NORTH CAROLINA: *Love v. Dickerson*, 85 N. C. 5.

PENNSYLVANIA: *Blume v. Hartman*, 115 Pa. 32, 2 A. S. R. 525; *Richards v. Nixon*, 20 Pa. 19.

SOUTH CAROLINA: *Moses v. Gatewood*, 5 Rich. Law, 234.

WISCONSIN: *Dahlman v. Hammel*, 45 Wis. 466.

However, the fact that a statute gives one party in a particular proceeding the right to open and close does not place the burden of proof on him. *Ex parte Newman*, 38 Tex. Cr. App. 165, 70 A. S. R. 740.

<sup>30</sup> *Miles v. U. S.*, 103 U. S. 304; *Bennett v. State*, 86 Ga. 401, 22 A. S. R. 465; *French v. State*, 12 Ind. 670, 74 A. D. 229; *People v. Finley*, 38

is the same in a prosecution for defamation by charging another with crime. Unless the evidence is such as to convince the jury, beyond a reasonable doubt, that the prosecuting witness is innocent of the crime attributed to him by the accused, their verdict must be for acquittal.<sup>21</sup>

The question whether sanity or insanity may be established by a preponderance of the evidence, or must be proved beyond a reasonable doubt, presents a conflict of authority which is closely related to the question of burden of proof as to those facts.<sup>22</sup> In some jurisdictions the accused is obliged to prove insanity beyond a reasonable doubt. A preponderance of the evidence is not sufficient to entitle him to an acquittal.<sup>23</sup> In other jurisdictions he may and must establish insanity by a preponderance of the evidence. He is not, on the one hand, required to convince the jury of insanity beyond a reasonable doubt, yet, on the other hand, he is not entitled to an acquittal upon adducing evidence which merely raises a reasonable doubt of his sanity.<sup>24</sup> In yet other jurisdictions the accused

*Mich.* 482; *Burt v. State*, 72 *Miss.* 408, 48 *A. S. R.* 563; *Tiffany v. Com.*, 121 *Pa.* 165, 6 *A. S. R.* 775; *State v. Hoxsle*, 15 *R. I.* 1, 2 *A. S. R.* 838; *Billard v. State*, 30 *Tex.* 367, 94 *A. D.* 317; *Vaughan v. Com.*, 85 *Va.* 671; 8 *Current Law*, 189.

<sup>21</sup> *McArthur v. State*, 59 *Ark.* 431; *State v. Bush*, 122 *Ind.* 42; *State v. Wait*, 44 *Kan.* 310.

<sup>22</sup> Section 86, *infra*.

<sup>23</sup> *State v. West*, *Houst. Cr. Cas. (Del.)* 371; *State v. Pratt*, *Houst. Cr. Cas. (Del.)* 249; *State v. Spencer*, 21 *N. J. Law*, 196; *State v. Hansen*, 25 *Or.* 391 (statute). The same doctrine has been announced in other cases also, which, however, have been overruled.

The contrary is held in *People v. McCann*, 16 *N. Y.* 58, 69 *A. D.* 642, and other cases cited in the two succeeding notes. The later New Jersey cases seem to disregard *State v. Spencer*, 21 *N. J. Law*, 196. See note 34, *infra*.

<sup>24</sup> **ALABAMA:** *Parsons v. State*, 81 *Ala.* 577, 60 *A. R.* 193; *Ford v. State*, 71 *Ala.* 385; *Boswell v. State*, 63 *Ala.* 307, 35 *A. R.* 20, overruling *State v. Marler*, 2 *Ala.* 43, 36 *A. D.* 398; *Maxwell v. State*, 89 *Ala.* 150.

is not required to establish insanity either beyond a reasonable doubt or by a preponderance of the evidence. It is suffi-

ARKANSAS: *Williams v. State*, 50 Ark. 511; *Bolling v. State*, 54 Ark. 588.

CALIFORNIA: *People v. McNulty*, 93 Cal. 427; *People v. Ward*, 105 Cal. 335; *People v. Messersmith*, 61 Cal. 246; *People v. Coffman*, 24 Cal. 230; *People v. Bawden*, 90 Cal. 195; *People v. Allender*, 117 Cal. 81.

IOWA: *State v. Trout*, 74 Iowa, 545, 7 A. S. R. 499 (semble); *State v. Jones*, 64 Iowa, 349.

KENTUCKY: *Phelps v. Com.*, 17 Ky. L. R. 706, 32 S. W. 470.

LOUISIANA: *State v. Scott*, 49 La. Ann. 253, 36 L. R. A. 721, overruling *State v. De Rance*, 34 La. Ann. 186, 44 A. R. 426.

MAINE: *State v. Lawrence*, 57 Me. 574.

MASSACHUSETTS: *Com. v. Eddy*, 7 Gray, 583.

MISSOURI: *State v. Redemeier*, 71 Mo. 173, 36 A. R. 462; *State v. McCoy*, 34 Mo. 531, 86 A. D. 121.

NEVADA: *State v. Lewis*, 20 Nev. 333; *State v. Hartley*, 22 Nev. 342, 28 L. R. A. 33.

NEW JERSEY: *Clawson v. State*, 59 N. J. Law, 434; *Graves v. State*, 45 N. J. Law, 347, 46 A. R. 778.

OHIO: *Kelch v. State*, 55 Ohio St. 146, 60 A. S. R. 680; *Bond v. State*, 23 Ohio St. 349.

PENNSYLVANIA: *Com. v. Bezek*, 168 Pa. 603.

SOUTH CAROLINA: *State v. Alexander*, 30 S. C. 74, 14 A. S. R. 879; *State v. Paulk*, 18 S. C. 514.

TEXAS: *Fisher v. State*, 30 Tex. App. 502; *Leache v. State*, 22 Tex. App. 279.

UTAH: *People v. Dillon*, 8 Utah, 92.

A fair preponderance of evidence of insanity is all that is required of accused. A clear preponderance is not necessary. *Coyle v. Com.*, 100 Pa. 573, 45 A. R. 397; *Com. v. Gerade*, 145 Pa. 289, 27 A. S. R. 689.

In some states the accused must prove insanity to the satisfaction of the jury. *McAllister v. State*, 17 Ala. 434, 52 A. D. 180; *State v. Bruce*, 48 Iowa, 530; *Com. v. Rogers*, 7 Metc. (Mass.) 500, 41 A. D. 458; *State v. Schaefer*, 116 Mo. 96; *Baccigalupo v. Com.*, 33 Grat. (Va.) 807, 36 A. R. 795; *Dejarnette v. Com.*, 75 Va. 867.

In Georgia it is held that, "in order to render the distinctive defense of insanity available as a basis for an acquittal, the burden is on the accused to show affirmatively, by a preponderance of the evidence introduced at the trial, that he was insane at the time the act for which he is indicted was committed. Though this burden may not be successfully carried, so as to authorize a verdict of not guilty on this par-

cient to require an acquittal if the evidence adduced either by him or by the state raises a reasonable doubt of his sanity.<sup>35</sup>

A crime may be proved by indirect or circumstantial evidence,<sup>36</sup> but in this event all the evidentiary facts must be consistent with each other, and the evidence as a whole must be not only consistent with the accused's guilt, but inconsistent with any other rational conclusion.<sup>37</sup> And every cir-

ticular ground, it is nevertheless the duty of the jury to consider the evidence touching the alleged insanity in connection with the other evidence in the case, and then, in view of it all, determine whether or not a reasonable doubt of the guilt of the accused exists in their minds." *Ryder v. State*, 100 Ga. 528, 38 L. R. A. 721.

<sup>35</sup> UNITED STATES: *Davis v. U. S.*, 160 U. S. 469, *Thayer, Cas. Ev.* 90.

COLORADO: *Jones v. People*, 23 Colo. 276.

CONNECTICUT: *State v. Johnson*, 40 Conn. 136.

FLORIDA: *Hodge v. State*, 26 Fla. 11; *Armstrong v. State*, 30 Fla. 170, 17 L. R. A. 484; *Id.*, 27 Fla. 366, 26 A. S. R. 72.

ILLINOIS: *Hopps v. People*, 31 Ill. 385, 83 A. D. 231; *Lilly v. People*, 148 Ill. 467; *Dacey v. People*, 116 Ill. 555.

INDIANA: *Plummer v. State*, 135 Ind. 308; *Guetig v. State*, 66 Ind. 94, 32 A. R. 99; *Plake v. State*, 121 Ind. 433, 16 A. S. R. 408.

KANSAS: *State v. Crawford*, 11 Kan. 32.

MISSISSIPPI: *Cunningham v. State*, 56 Miss. 269, 31 A. R. 360.

NEBRASKA: *Wright v. People*, 4 Neb. 407.

NEW HAMPSHIRE: *State v. Bartlett*, 43 N. H. 224, 80 A. D. 154; *State v. Jones*, 50 N. H. 369, 9 A. R. 242, 266.

NEW YORK: *Brotherton v. People*, 75 N. Y. 159.

OKLAHOMA: *Maas v. Ter.*, 10 Okl. 714, 53 L. R. A. 814.

TENNESSEE: *King v. State*, 91 Tenn. 617; *Dove v. State*, 3 Heisk. 348.

And see *Com. v. Heath*, 11 Gray (Mass.) 303. *Contra, Cavaness v. State*, 43 Ark. 331; *Hornish v. People*, 142 Ill. 620; *Lynch v. Com.*, 77 Pa. 205; *Coyle v. Com.*, 100 Pa. 573, 45 A. R. 397; *Ortwein v. Com.*, 76 Pa. 414, 18 A. R. 420; *Webb v. State*, 9 Tex. App. 490. Other cases to the contrary are cited in the two preceding notes.

<sup>36</sup> *People v. Morrow*, 60 Cal. 142; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 A. D. 711; *Rea v. State*, 8 Lea (Tenn.) 356.

<sup>37</sup> *Hodge's Case*, 2 Lewin, Cr. Cas. 227; *U. S. v. Douglass*, 2 Blatchf. 207, Fed. Cas. No. 14,989; *Ex parte Acree*, 63 Ala. 234; *People v. Dole*, 122 Cal. 486, 68 A. S. R. 50; *Carlton v. People*, 150 Ill. 181, 41 A. S. R. 346; *Rhodes v. State*, 128 Ind. 189, 25 A. S. R. 429; *State v. Clifford*,

cumstance constituting a necessary link in a chain of circumstantial evidence must be proved beyond a reasonable doubt, else the jury cannot convict.<sup>38</sup>

(b) **Civil cases.** The strict measure of evidence required in criminal cases does not obtain in civil proceedings. In these the party upon whom the burden of proof rests is entitled to a verdict if he persuades the jury of the truth of his contentions by a preponderance of the evidence.<sup>39</sup> Thus a preponderance of evidence is sufficient to establish fraud<sup>40</sup> and

<sup>38</sup> Iowa, 550, 41 A. S. R. 518; *Horne v. State*, 1 Kan. 42, 81 A. D. 499; *Com. v. Goodwin*, 14 Gray (Mass.) 55; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 A. D. 711; *People v. Alkin*, 66 Mich. 460, 11 A. S. R. 512; *Morgan v. State*, 51 Neb. 672; *State v. Atkinson*, 40 S. C. 363, 42 A. S. R. 877; *Hocker v. State*, 34 Tex. Cr. App. 359, 53 A. S. R. 716.

<sup>39</sup> *People v. Ah Chung*, 54 Cal. 398; *People v. Dole*, 122 Cal. 486, 68 A. S. R. 50; *Clare v. People*, 9 Colo. 122; *Sumner v. State*, 5 Blackf. (Ind.) 579, 36 A. D. 561; *People v. Alkin*, 66 Mich. 460, 11 A. S. R. 512; *State v. Gleim*, 17 Mont. 17; *State v. Crane*, 110 N. C. 530; *Leonard v. Ter.*, 2 Wash. T. 381. And see *U. S. v. Douglass*, 2 Blatchf. 207, Fed. Cas. No. 14,989; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 A. D. 711; *Marion v. State*, 16 Neb. 349; *Morgan v. State*, 51 Neb. 672, 698; *Faulkner v. Ter.*, 6 N. M. 465. *Contra*, *Carlton v. People*, 150 Ill. 181, 41 A. S. R. 346; *Hinshaw v. State*, 147 Ind. 334; *State v. Hayden*, 45 Iowa, 11.

If the facts are independent and cumulative, then, of course, all need not be established beyond a reasonable doubt.

<sup>40</sup> *Phillipson v. Hayter*, L. R. 6 C. P. 38; *Murphy v. Waterhouse*, 113 Cal. 467, 54 A. S. R. 365; *Perot v. Cooper*, 17 Colo. 80, 31 A. S. R. 258; *Abbott v. Stone*, 172 Ill. 634, 64 A. S. R. 60; *French v. Day*, 89 Me. 441; *Moore v. Stone* (Tex. Civ. App.) 36 S. W. 909.

It has been held, however, that a preponderance of evidence is not sufficient to establish mutual mistake as ground of reformation of an instrument. *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Fudge v. Payne*, 86 Va. 303.

<sup>41</sup> *Adams v. Thornton*, 78 Ala. 489, 56 A. R. 49; *Carter v. Gunnels*, 67 Ill. 270; *Baltimore, O. & C. R. Co. v. Scholes*, 14 Ind. App. 524, 56 A. S. R. 307; *Turner v. Younker*, 76 Iowa, 258; *Kansas Mill Owners' & Manufacturers' M. F. Ins. Co. v. Rammelsberg*, 58 Kan. 531, 534; *Hough v. Dickinson*, 58 Mich. 89; *Burr v. Willson*, 22 Minn. 206; *Lee v.*

negligence,<sup>41</sup> and it is sufficient also in remedial proceedings for contempt of court.<sup>42</sup>

A preponderance of the evidence entitles the proponent to a verdict in a civil case, even though it is necessary for him to prove a criminal act as a part of his case.<sup>43</sup> It is sufficient, for example, in actions for defamation by charging crime,<sup>44</sup>

Pearce, 68 N. C. 76; Jones v. Greaves, 26 Ohio St. 2, 20 A. R. 752; Sparks v. Dawson, 47 Tex. 138; Schmick v. Noel, 72 Tex. 1.

The rule is the same as to fraud amounting to crime. Note 43, *infra*.

To prove fraud, the evidence must be clear and satisfactory. Lalone v. U. S., 164 U. S. 255; Beck & P. Lithographing Co. v. Houppert, 104 Ala. 503, 53 A. S. R. 77; Kahn v. Traders' Ins. Co., 4 Wyo. 419, 62 A. S. R. 47.

<sup>41</sup> North Chicago St. R. Co. v. Louis, 138 Ill. 9; Seybolt v. N. Y., L. E. & W. R. Co., 95 N. Y. 562, 47 A. R. 75.

<sup>42</sup> Drakeford v. Adams, 98 Ga. 722.

<sup>43</sup> Elliott v. Van Buren, 33 Mich. 49, 20 A. R. 668; People v. Briggs, 114 N. Y. 56; Heiligmann v. Rose, 81 Tex. 222, 26 A. S. R. 804; Weston v. Gravin, 49 Vt. 507. *Contra*, Schultz v. Pac. Ins. Co., 14 Fla. 73.

*Fraud constituting crime.* Coit v. Churchill, 61 Iowa, 296; Gordon v. Parmelee, 15 Gray (Mass.) 413; Thoreson v. N. W. Nat. Ins. Co., 29 Minn. 107; Jones v. Greaves, 26 Ohio St. 2, 20 A. R. 752; Catasaqua Mfg. Co. v. Hopkins, 141 Pa. 30. Civil fraud, see note 40, *supra*.

In some states the question depends upon whether or not a specific criminal charge is made in the pleadings. If so, the offense must be proved beyond a reasonable doubt; but if the charge of crime is by implication merely, a preponderance of evidence will suffice, even though the facts charged involve the party in the moral turpitude of a crime. Sprague v. Dodge, 48 Ill. 142, 95 A. D. 523; Germania F. Ins. Co. v. Klewer, 129 Ill. 599; Grimes v. Hilllary, 150 Ill. 141; Bissell v. Wert, 35 Ind. 54; Sinclair v. Jackson, 47 Me. 102, 74 A. D. 476; Schmidt v. N. Y. Union Mut. F. Ins. Co., 1 Gray (Mass.) 529; Burr v. Willson, 22 Minn. 206; Kane v. Hibernia Ins. Co., 39 N. J. Law, 697, 22 A. R. 239, 241.

<sup>44</sup> Spruill v. Cooper, 16 Ala. 791; Hearne v. De Young, 119 Cal. 670; Downing v. Brown, 3 Colo. 571; Atlanta Journal v. Mayson, 92 Ga. 640, 44 A. S. R. 104; Tunnell v. Ferguson, 17 Ill. App. 76 (statute); Wintrobe v. Renbarger, 150 Ind. 556 (statute); Riley v. Norton, 65 Iowa, 306; Sloan v. Gilbert, 12 Bush (Ky.) 51, 23 A. R. 708; Ellis v. Buzzell, 60 Me. 209, 11 A. R. 204; McBee v. Fulton, 47 Md. 403, 28 A. R. 465;

and actions to recover a penalty or forfeiture,<sup>45</sup> and it is sufficient to establish adultery,<sup>46</sup> bastardy,<sup>47</sup> and seduction,<sup>48</sup> arson,<sup>49</sup> larceny or receiving stolen goods,<sup>50</sup> and forgery.<sup>51</sup>

Owen v. Dewey, 107 Mich. 67; Edwards v. Knapp, 97 Mo. 432; Barfield v. Britt, 47 N. C. (2 Jones) 41, 62 A. D. 190; Bell v. McGinness, 40 Ohio St. 204, 48 A. R. 673; McClaugherty v. Cooper, 39 W. Va. 313, 319 (semble); Kidd v. Fleek, 47 Wis. 443. *Contra*, Williams v. Gunnels, 66 Ga. 521 (semble); Corbley v. Wilson, 71 Ill. 209; Fowler v. Wallace, 131 Ind. 347; Lanter v. McEwen, 8 Blackf. (Ind.) 495; Burckhalter v. Coward, 16 S. C. 435. And see Chalmers v. Shackell, 6 Car. & P. 475; Willmet v. Harmer, 8 Car. & P. 695.

The same is true in an action for malicious prosecution for slander. Smith v. Burrus, 106 Mo. 94, 27 A. S. R. 329.

A plea justifying a charge of perjury must be sustained by two witnesses, or by one witness with strong corroborating circumstances, the same as in criminal cases. Spruill v. Cooper, 16 Ala. 791; Woodbeck v. Keller, 6 Cow. (N. Y.) 118; Gorman v. Sutton, 32 Pa. 247; Coulter v. Stuart, 2 Yerg. (Tenn.) 225. *Contra*, Folsom v. Brawn, 25 N. H. 114.

<sup>45</sup> Munson v. Atwood, 30 Conn. 102; Roberge v. Burnham, 124 Mass. 277; Sparta v. Lewis, 91 Tenn. 370. *Contra*, U. S. v. Shapleigh, 54 Fed. 126; Riker v. Hooper, 35 Vt. 457, 82 A. D. 646.

The same is true in an action under the civil damage acts. Robinson v. Randall, 82 Ill. 521.

<sup>46</sup> Chestnut v. Chestnut, 88 Ill. 548; Allen v. Allen, 101 N. Y. 658; Smith v. Smith, 5 Or. 186 (statute); Lindley v. Lindley, 68 Vt. 421; Poertner v. Poertner, 66 Wis. 644. *Contra*, Berckmans v. Berckmans, 17 N. J. Eq. 453.

<sup>47</sup> Lewis v. People, 82 Ill. 104; People v. Christman, 66 Ill. 162; Walker v. State, 6 Blackf. (Ind.) 1; State v. McGlothlen, 56 Iowa, 544; Knowles v. Scribner, 57 Me. 495; Young v. Makepeace, 103 Mass. 50; Richardson v. Burleigh, 3 Allen (Mass.) 479; Semon v. People, 42 Mich. 141; State v. Nichols, 29 Minn. 357; Dukehart v. Coughman, 36 Neb. 412; State v. Bunker, 7 S. D. 639; Stovall v. State, 9 Bart. (Tenn.) 597. And see Miller v. State, 110 Ala. 69. *Contra*, State v. Rogers, 119 N. C. 793; Baker v. State, 47 Wis. 111.

*Legitimacy.* Some cases hold that, to bastardize the issue of a married woman on the ground of nonaccess of the husband to her, the fact of nonaccess within the necessary period must be shown beyond a reasonable doubt. Sullivan v. Kelly, 3 Allen (Mass.) 148; Cross v. Cross, 3 Paige (N. Y.) 139, 23 A. D. 778, 779. Other cases hold that a preponderance of evidence is sufficient to establish nonaccess. Wright

The sole function of a presumption is to cast on the party against whom it operates the burden of adducing evidence to disprove the fact which it assumes to exist.<sup>52</sup> Whether a presumption may be rebutted by a preponderance of the evidence, or whether evidence dispelling all reasonable doubt is necessary to rebut it, is a question concerning the meas-

v. Hicks, 12 Ga. 155, 56 A. D. 451, 454; *Id.*, 15 Ga. 160, 60 A. D. 687, 692. And see *State v. Romaine*, 58 Iowa, 46. In any event, in order to bastardize the issue, the evidence must be clear and satisfactory. *Banbury Peerage Case*, 1 Sim. & S. 153, Thayer, Cas. Ev. 45; *Wright v. Hicks*, 15 Ga. 160, 60 A. D. 687, 694; *Egbert v. Greenwalt*, 44 Mich. 245, 38 A. R. 260, 264; *Scott v. Hillenberg*, 85 Va. 245. And some cases hold that it must be conclusive. *Hargrave v. Hargrave*, 9 Beav. 552, 555; *Atchley v. Sprigg*, 33 Law J. Ch. 345; *Watts v. Owens*, 62 Wis. 512. And see *State v. Romaine*, 58 Iowa, 46. Evidence to rebut presumption of legitimacy, see § 60, *infra*.

<sup>48</sup> *Nelson v. Pierce*, 18 R. I. 539.

<sup>49</sup> *Scott v. Home Ins. Co.*, 1 Dill. 105, Fed. Cas. No. 12,533; *Howell v. Hartford F. Ins. Co.*, 3 Ins. Law J. (O. S.) 653, Fed. Cas. No. 6,780; *Mead v. Husted*, 52 Conn. 53, 52 A. R. 554; *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, 59 A. R. 194; *Behrens v. Germania Ins. Co.*, 58 Iowa, 26; *Aetna Ins. Co. v. Johnson*, 11 Bush (Ky.) 587, 21 A. R. 223; *Decker v. Somerset Mut. F. Ins. Co.*, 66 Me. 406 (semble); *Schmidt v. N. Y. Union Mut. F. Ins. Co.*, 1 Gray (Mass.) 529; *Marshall v. Thames F. Ins. Co.*, 43 Mo. 586; *Rothschild v. American Cent. Ins. Co.*, 62 Mo. 356; *Kane v. Hibernia Ins. Co.*, 39 N. J. Law, 697, 23 A. R. 239; *Ripley v. Miller*, 46 N. C. (1 Jones) 479, 62 A. D. 177; *Blackburn v. St. P. F. & M. Ins. Co.*, 116 N. C. 821; *First Nat. Bank v. Commercial Assur. Co.*, 33 Or. 43; *Somerset County Mut. F. Ins. Co. v. Usaw*, 112 Pa. 80, 56 A. R. 307; *Blaesser v. Milwaukee Mechanics' Mut. Ins. Co.*, 37 Wis. 31, 19 A. R. 747. And see *Wightman v. Western M. & F. Ins. Co.*, 8 Rob. (La.) 442; *Hoffman v. Western M. & F. Ins. Co.*, 1 La. Ann. 216. *Contra*, *Thurtell v. Beaumont*, 1 Bing. 339; *Germania F. Ins. Co. v. Klewer*, 129 Ill. 599; *Barton v. Thompson*, 46 Iowa, 30, 26 A. R. 131; *Butman v. Hobbs*, 35 Me. 227.

<sup>50</sup> *Sinclair v. Jackson*, 47 Me. 102, 74 A. D. 476; *Neb. Nat. Bank v. Johnson*, 51 Neb. 546; *U. S. Exp. Co. v. Jenkins*, 73 Wis. 471.

<sup>51</sup> *Brown v. Tourtelotte*, 24 Colo. 204; *Hills v. Goodyear*, 4 Lea (Tenn.) 233, 40 A. R. 5.

<sup>52</sup> Sections 16(c), 17(b), *infra*.



ure or sufficiency of evidence.<sup>53</sup> The burden of adducing evidence in rebuttal rests, in either event, on the party against whom the presumption operates. This being the case, it does not detract from the proper effect of the presumption of innocence to say, as in the cases just considered, that it may be overcome by a preponderance of the evidence. It is to be observed, however, that even though, in civil cases, a preponderance is sufficient to overcome this presumption, yet it may require a greater amount of evidence to constitute a preponderance on the side of crime than it would to constitute a preponderance on the side of a wrongful act not criminal in character.<sup>54</sup>

#### E. ASCERTAINMENT.

§ 7. It is a question of practical importance to determine upon which party the burden of proof rests; and in this connection attention may again be called to the distinction between the two meanings of that term. As has been shown, it may mean either the burden of convincing the jury of the existence of the facts in issue, or the burden of adducing evidence tending to support a party's own contentions or to overcome those of his adversary.<sup>55</sup>

#### § 8. Ascertainment of burden of convincing jury.

Various tests have been suggested for determining which party bears the burden of proof in the sense of burden of convincing the jury of the existence of the facts in issue. It will generally be found, however, that these tests are not

<sup>53</sup> Section 6, *supra*.

<sup>54</sup> *Sprague v. Dodge*, 48 Ill. 142, 95 A. D. 523; *Decker v. Somerset Mut. F. Ins. Co.*, 66 Me. 406; *Jones v. Greaves*, 26 Ohio St. 2, 20 A. R. 752, 755; *Somerset County Mut. F. Ins. Co. v. Usaw*, 112 Pa. 80, 56 A. R. 307, 309; *Hills v. Goodyear*, 4 Lea (Tenn.) 233, 40 A. R. 5, 9; *Bradish v. Bliss*, 35 Vt. 326.

<sup>55</sup> Section 2, *supra*.

truly such, and that they merely convert one question into another.<sup>56</sup> The question of burden of proof, as has aptly been observed, is one of policy, justice, and convenience, based on experience of the different situations;<sup>57</sup> and to ascertain which party bears it, we must resort to the rules of substantive law applicable to the particular case as supplemented by rules of pleading.

(a) **Burden as fixed by rules of substantive law.** The burden of proving facts which the substantive law regards as elements of the right asserted ordinarily rests on the party asserting the right;<sup>58</sup> while new facts avoiding the legal effect attaching to an asserted case are generally provable by the adverse party.<sup>59</sup> Thus, in an action for breach of contract, the plaintiff must prove the contract and the breach,<sup>60</sup> while the defendant, if he alleges payment of the demand in suit, has the burden of proving that fact.<sup>61</sup>

But there are exceptions to this rule. The party defending, on the one hand, is sometimes compelled to negative the existence of facts which are essential to the asserted right;<sup>62</sup> and the party asserting the right, on the other hand, is sometimes compelled to negative the existence of facts which would defeat the right. In an action on contract, for instance, capacity to enter into the contract and legality of the contract are facts which must be negated by the defendant if he would avoid liability on either of those grounds; and this is

<sup>56</sup> Sections 8(b), 9, *infra*.

<sup>57</sup> Thayer, *Prel. Treat. Ev.* 376; Wigmore, *Greenl. Ev.* p. 97; *Lisbon v. Lyman*, 49 N. H. 553, 566; *Herrman v. G. N. R. Co.*, 27 Wash. 472, 57 L. R. A. 390, 393.

<sup>58</sup> *Murphy v. Harris*, 77 Cal. 194; *Shattuck v. Rogers*, 54 Kan. 266.

<sup>59</sup> *Burford v. Fergus*, 165 Pa. 310, 314.

<sup>60</sup> Section 8(c), *infra*.

<sup>61</sup> Section 74, *infra*.

<sup>62</sup> *Borthwick v. Carruthers*, 1 Term R. 648, 649.

true, notwithstanding that capacity of the parties and legality of object are essential to the enforceability of a contract.<sup>63</sup> In an action for negligence, on the other hand, the plaintiff must, in some jurisdictions, prove an absence of contributory negligence, even though his evidence of negligence on the part of the defendant does not tend to show negligence on his own part.<sup>64</sup>

(b) **Burden as fixed by rules of pleading.** Generally speaking, the burden of convincing the jury of the existence of the facts on which an asserted right depends is fixed by rules of pleading as influenced by rules of substantive law; and these rules, it may be said, generally place the burden on the actor, —that is, the party, whether plaintiff or defendant, who asks the court actively to intervene in his behalf.<sup>65</sup> In other words, the burden of proof is on the party who has the affirmative of the issue.<sup>66</sup>

It is frequently said that the burden of proof is on the party

<sup>63</sup> Coverture as an affirmative defense, see note 85, *infra*. Infancy as an affirmative defense, see section 33, *infra*. Illegality as an affirmative defense, see § 57, *infra*.

<sup>64</sup> It is to be observed, however, that the better rule casts the burden of proving contributory negligence on the defendant as an affirmative defense. Section 67, *infra*.

<sup>65</sup> Thayer, *Prel. Treat. Ev.* 369, 370; *Osgood v. Groseclose*, 159 Ill. 511; *Capen v. Woodrow*, 51 Vt. 106, 108; *Dahlman v. Hammel*, 45 Wis. 466.

The burden of proving a particular allegation lies on the party who would fail, as a matter of law, if the allegation were stricken from the pleading. *Tayl. Ev.* § 365; *Millis v. Barber*, 1 Mees. & W. 425, 427 (semble); *McKenzie v. Or. Imp. Co.*, 5 Wash. 409, 419.

The fact that an averment is an alternative proposition does not relieve the pleader from the burden of proving either the one or the other of the alternatives. *Lisbon v. Lyman*, 49 N. H. 553, 565.

<sup>66</sup> *Scott v. Wood*, 81 Cal. 398; *Borden v. Croak*, 131 Ill. 68, 19 A. S. R. 23; *McClure v. Pursell*, 6 Ind. 330; *Blum v. Strong*, 71 Tex. 321.

This rule is embodied in the maxim, *Et incumbit probatio qui dicit, non qui negat*.

having the "affirmative allegation."<sup>67</sup> "This is a rule of convenience, adopted," says Professor Greenleaf, "not because it is impossible to prove a negative, but because the negative does not admit of the direct and simple proof of which the affirmative is capable."<sup>68</sup> As a matter of fact, this is often the case; and it is also true that the difficulty of proving a negative may have some effect on the policy of the law which fixes the burden of proof in particular cases;<sup>69</sup> but the so-called rule does not furnish a general test for identifying the party having the burden of proof. Indeed, most of the authorities that lay it down admit so many exceptions to it as practically to nullify it as a general rule.<sup>70</sup> The truth of the matter is that the burden of proof as to the existence or nonexistence of a given fact rests on the party, whether plaintiff or defendant, who asserts that the fact does or does not exist. The form of the allegation is immaterial. The test is whether the negative constitutes an essential ingredient in the cause of action or defense.<sup>71</sup> In an action for malicious

<sup>67</sup> *U. S. v. Hayward*, 2 Gall. 485, Fed. Cas. No. 15,336; *Ft. Smith v. Dodson*, 51 Ark. 447, 14 A. S. R. 62; *Bowser v. Bliss*, 7 Blackf. (Ind.) 344, 43 A. D. 93.

<sup>68</sup> 1 Greenl. Ev. § 74; *Stevenson v. Marony*, 29 Ill. 532, 534; *Dranguet v. Prudhomme*, 3 La. 83.

<sup>69</sup> *Wigmore*, Greenl. Ev. § 78, note 1; *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 377, 378. Ordinarily, however, the difficulty of proving an essential fact does not relieve the party from the burden of proving it. *West Pub. Co. v. Lawyers' Co-op. Pub. Co.*, 64 Fed. 360, 25 L. R. A. 441.

<sup>70</sup> It is said, for instance, that in determining whether an allegation is affirmative or negative, within the meaning of this rule, regard is had to the substance and effect of the issue, rather than to its form, since in many cases the issue may be given either a negative or an affirmative form, at the pleasure of the pleader, by a deft use of words. *Soward v. Leggatt*, 7 Car. & P. 613; *Scott v. Wood*, 81 Cal. 398; *Goodwin v. Smith*, 72 Ind. 113, 37 A. R. 144. And see *Langdell, Eq. Plead.* § 108. This goes a long way towards nullifying the rule as stated.

<sup>71</sup> ENGLAND: *Doe d. Caldecott v. Johnson*, 7 Man. & G. 1047; *Elkin v.*

prosecution, for example, the plaintiff has the burden of proving that the prosecution was without probable cause.<sup>72</sup>

JANSON, 13 Mees. & W. 655; Williams v. East India Co., 3 East, 192; Powell v. Milburn, 3 Wils. 355, 366.

UNITED STATES: Colo. C. & I. Co. v. U. S., 123 U. S. 307.

ALABAMA: Ala. G. S. R. Co. v. Frazier, 93 Ala. 45, 30 A. S. R. 28.

GEORGIA: Conyers v. State, 50 Ga. 103, 15 A. R. 686 (statute).

ILLINOIS: Woodbury v. Frink, 14 Ill. 279; Great Western R. Co. v. Bacon, 30 Ill. 347, 83 A. D. 199.

INDIANA: Towsey v. Shook, 3 Blackf. 267, 25 A. D. 108; Goodwin v. Smith, 72 Ind. 113, 37 A. R. 144; Carmel Nat. G. & I. Co. v. Small, 150 Ind. 427.

MAINE: Little v. Thompson, 2 Me. 228.

MASSACHUSETTS: Com. v. Samuel, 2 Pick. 103; Crowninshield v. Crowninshield, 2 Gray, 524, Thayer, Cas. Ev. 100, 102; Willett v. Rich, 142 Mass. 356, 56 A. R. 684.

MISSISSIPPI: Kerr v. Freeman, 33 Miss. 292.

MISSOURI: State v. Hirsch, 45 Mo. 429.

MONTANA: Hadley v. Rash, 21 Mont. 170, 69 A. S. R. 649.

NEW HAMPSHIRE: Lisbon v. Lyman, 49 N. H. 553.

NEW YORK: Heinemann v. Heard, 62 N. Y. 448; Roberts v. Chittenden, 88 N. Y. 33.

The same rule applies to evidentiary facts as to facts directly in issue. If a party relies on the nonexistence of a particular fact in support of his case, he must adduce evidence to prove it. Boulden v. McIntire, 119 Ind. 574, 12 A. S. R. 453.

Slight proof is sufficient to sustain a negative averment. Calder v. Rutherford, 3 Brod. & B. 302, 7 Moore, 158; Dorsey v. Brigham, 177 Ill. 250, 69 A. S. R. 228; Beardstown v. Virginia, 76 Ill. 34; Woodbury v. Frink, 14 Ill. 279; State v. Hirsch, 45 Mo. 429. And see Kelley v. Owens (Cal.) 30 Pac. 596.

<sup>72</sup> Purcel v. McNamara, 1 Camp. 199, 9 East, 361; Abrath v. N. E. R. Co., 11 Q. B. Div. 440, 451, Thayer, Cas. Ev. 78, 81; Lunsford v. Dietrich, 93 Ala. 565, 30 A. S. R. 79; Joiner v. Ocean S. S. Co., 86 Ga. 238; Ames v. Snider, 69 Ill. 376; Smith v. Zent, 59 Ind. 362; Carey v. Sheets, 67 Ind. 375, 378; Lucas v. Hunt, 91 Ky. 279; Good v. French, 115 Mass. 201; Boeger v. Langenberg, 97 Mo. 390, 10 A. S. R. 322; Dreyfus v. Aul, 29 Neb. 191; Anderson v. How, 116 N. Y. 336; King v. Colvin, 11 R. I. 582; McManus v. Wallis, 52 Tex. 534. See, however, Mimandre v. Alard, 14 L. C. 154.

It seems that the burden of proof is on the defendant, however, if it appears that the plaintiff was discharged or acquitted of the charge,

If the defense consists of the general issue, or of matter in substance and effect a simple denial of the right of action, the burden of proof ordinarily rests on the plaintiff.<sup>73</sup> If, on the other hand, the defense consists of matter in confession and avoidance, which the plaintiff denies, then the burden of proof rests on the defendant;<sup>74</sup> and the same is true where

or that the proceeding was dismissed. *Lunsford v. Dietrich*, 93 Ala. 565, 30 A. S. R. 79; *Barbight v. Tammany*, 158 Pa. 545, 38 A. S. R. 853. See, however, *Boeger v. Langenberg*, 97 Mo. 390, 10 A. S. R. 322.

<sup>73</sup> ENGLAND: *Hingeston v. Kelly*, 18 Law J. Exch. 360, *Thayer, Cas. Ev.* 76; *Smith v. Davies*, 7 Car. & P. 307; *Shilcock v. Passman*, 7 Car. & P. 289.

ALABAMA: *Tenn. C., I. & R. Co. v. Hamilton*, 100 Ala. 252, 46 A. S. R. 48.

INDIANA: *Lafayette v. Wortman*, 107 Ind. 404; *Lafayette & I. R. Co. v. Ehman*, 30 Ind. 83.

IOWA: *Homire v. Rodgers*, 74 Iowa, 395.

KENTUCKY: *Lucas v. Hunt*, 91 Ky. 279.

MASSACHUSETTS: *Starratt v. Mullen*, 148 Mass. 570; *Phipps v. Mahon*, 141 Mass. 471; *Gay v. Bates*, 99 Mass. 263; *Wilder v. Cowles*, 100 Mass. 487.

MICHIGAN: *Berringer v. Lake Superior Iron Co.*, 41 Mich. 305; *Ingalls v. Eaton*, 25 Mich. 32.

NEBRASKA: *McEvoy v. Swayze*, 34 Neb. 315.

NEW YORK: *Farmers' L. & T. Co. v. Slefke*, 144 N. Y. 354.

PENNSYLVANIA: *Falconer v. Smith*, 18 Pa. 130, 55 A. D. 611.

TENNESSEE: *Warfield v. Railroad*, 104 Tenn. 74, 78 A. S. R. 911.

See, however, *Pendleton v. Cline*, 85 Cal. 142; *Henderson v. Louisville*, 8 Ky. L. R. 957, 4 S. W. 187; *McCrea v. Marshall*, 1 La. Ann. 29; *Attleborough v. Middleborough*, 10 Pick. (Mass.) 378.

If defendant in an action of contract pleads the general issue, and admits that he made the promise sued on, but alleges that it was made on a condition, which it is admitted has not been performed, the defense is not affirmative, and the burden is on plaintiff to show an unconditional promise. *Eastman v. Gould*, 63 N. H. 89. *Contra*, *Southworth v. Hoag*, 42 Ill. 446.

<sup>74</sup> *Clements v. Moore*, 6 Wall. (U. S.) 299, 315; *Cooper v. Tyler*, 46 Ill. 462, 95 A. D. 442; *Foster v. Reid*, 78 Iowa, 205, 16 A. S. R. 437; *Woodson Mach. Co. v. Morse*, 47 Kan. 429; *Jones v. Pashby*, 67 Mich. 459, 11 A. S. R. 589; *Seavy v. Dearborn*, 19 N. H. 351; *Knott v. Whit-*

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a set-off or counterclaim is pleaded, or a cross complaint is interposed.<sup>75</sup> So, if an affirmative defense is thus pleaded, and the reply in turn confesses the new matter and sets up other new matter to avoid it, the burden of proof rests on the plaintiff.<sup>76</sup>

These rules as to burden of proof are substantially the same in actions at law and suits in equity.<sup>77</sup>

As a rule, in civil cases, the issue is made up before trial, and the burden of proof thereupon becomes fixed. However, the framing of the issue is sometimes delayed until the trial has commenced, and in these cases the burden of proof is not finally determined until that event.<sup>78</sup> So, if a defense is affirmative as a matter of substantive law, the burden of proving it ordinarily rests on the defendant, even though he is allowed to take advantage of it without specially pleading it.<sup>79</sup>

field, 99 N. C. 76, 79 (semble); *McQueen v. People's Nat. Bank*, 111 N. C. 509; *Weber v. Rothchild*, 15 Or. 385, 3 A. S. R. 162; *Loan & Exch. Bank v. Peterkin*, 52 S. C. 236, 68 A. S. R. 900. Criminal cases, see § 49(c), *infra*.

The burden of proving the truth of a plea in abatement also rests on the defendant. *Henwood v. State*, 11 Ind. App. 636.

<sup>75</sup> *Jones v. U. S.*, 39 Fed. 410; *Denver Fire-Brick Co. v. Platt*, 11 Colo. 509; *Underwood v. Wolf*, 131 Ill. 425, 19 A. S. R. 40; *Veiths v. Hagge*, 8 Iowa, 163; *Venable v. Dutch*, 37 Kan. 515, 1 A. S. R. 260; *Ballard v. Carmichael*, 83 Tex. 355; *Herriman Irr. Co. v. Butterfield Min. Co.*, 19 Utah, 453, 51 L. R. A. 930.

<sup>76</sup> *Bury v. Forsyth*, 3 Mont. Law Rep. 359; *Barnard v. Babbitt*, 54 Ill. App. 62; *Kent v. White*, 27 Ind. 390; *Hawes v. B., C. R. & N. R. Co.*, 64 Iowa, 315; *Robinson v. Hitchcock*, 8 Metc. (Mass.) 64.

<sup>77</sup> *Clements v. Moore*, 6 Wall. (U. S.) 299; *Clarke v. White*, 12 Pet. (U. S.) 178; *Evans v. Winston*, 74 Ala. 349; *Beecher v. Brookfield*, 33 Ark. 259; *Miller v. Lamar*, 43 Miss. 383; *Pusey v. Wright*, 31 Pa. 387; *McGhee Irr. Ditch Co. v. Hudson*, 85 Tex. 587; *Bryant v. Groves*, 42 W. Va. 10.

<sup>78</sup> *Ransone v. Christian*, 56 Ga. 351; *Doyle v. Unglish*, 143 N. Y. 556. See, however, *Lake Ontario Nat. Bank v. Judson*, 122 N. Y. 278. See note 3, *supra*, and § 49(c), note 423, *infra*.

The influence of rules of substantive law on rules of pleading is seen in cases where the plaintiff pleads a fact the non-existence of which, according to the substantive law, constitutes an affirmative defense. This does not charge him with the burden of proving it if it is not otherwise essential to his case.<sup>80</sup> And the fact that the defendant, in addition to denying the cause of action, alleges matter whose existence plaintiff would otherwise have to negative, or which is immaterial to the defense, does not require him to prove those facts.<sup>81</sup>

(c) **Actions relating to contracts.** In actions on contract, the burden of proof is on the plaintiff to show the existence of the contract as alleged,<sup>82</sup> and, in certain cases, performance thereof on his part,<sup>83</sup> and a breach thereof on the part

<sup>79</sup> Bell v. Skillicorn, 6 N. M. 399, 407, 408 (semble). As to criminal cases, see § 49(c), note 423, *infra*.

<sup>80</sup> Ala. G. S. R. Co. v. Frazier, 93 Ala. 45, 30 A. S. R. 28, 36; Jones v. U. S. Mut. Acc. Ass'n, 92 Iowa, 652; Hudson v. W. W. R. Co., 101 Mo. 13. See Murray v. N. Y. L. Ins. Co., 85 N. Y. 236.

A plaintiff is not required to prove an immaterial allegation in the complaint. Bigelow v. Burnham, 90 Iowa, 300, 48 A. S. R. 442; Hemingway v. State, 68 Miss. 371. The rule is otherwise at common law. Bell v. Senneff, 83 Ill. 122.

<sup>81</sup> Homire v. Rodgers, 74 Iowa, 395; Hawes v. B., C. R. & N. R. Co., 64 Iowa, 315; McEvoy v. Swayze, 34 Neb. 315; Capen v. Woodrow, 51 Vt. 106.

<sup>82</sup> Goodyear Dental Vulcanite Co. v. Bacon, 151 Mass. 460, 8 L. R. A. 486; Weaver v. Burr, 31 W. Va. 736, 3 L. R. A. 94.

In an action on an insurance policy, the burden is on the plaintiff to show that the loss arose from causes insured against. Sohler v. Norwich F. Ins. Co., 11 Allen (Mass.) 336; Cory v. Boylston F. & M. Ins. Co., 107 Mass. 140, 9 A. R. 14; Pelican Ins. Co. v. Troy Co-Op. Ass'n, 77 Tex. 225.

<sup>83</sup> *Substantial performance.* In an action to recover for substantial performance, the burden is on the contractor to prove what amount should be deducted from the contract price on account of the expense to which the owner will be put to supply omissions in performance.



of the defendant,<sup>84</sup> unless the defendant admits the contract and breach, and sets up an affirmative defense, in which case the burden of proof rests on him.<sup>85</sup> If an affirmative defense

If the contractor does not show this, he can recover nothing. *Spence v. Ham*, 163 N. Y. 220, 51 L. R. A. 238.

*Insurance.* Express warranties in an insurance policy are conditions precedent, and the burden of proving performance rests on the insured. *McLoon v. Commercial Mut. Ins. Co.*, 100 Mass. 472, 97 A. D. 116, 1 A. R. 129. The burden of proof on a plea of breach of the implied warranty of seaworthiness rests on the plaintiff. *Tidmarsh v. Wash. F. & M. Ins. Co.*, 4 Mason, 439, Fed. Cas. No. 14,024; *Wilson v. Hampden F. Ins. Co.*, 4 R. I. 159, 172 (semble). *Contra*, *Pickup v. Thames & M. M. Ins. Co.*, 3 Q. B. Div. 594, 600, Thayer, Cas. Ev. 106, 109. A presumption of seaworthiness makes a prima facie case in favor of plaintiff in the first instance, however, so that, if defendant asserts unseaworthiness, he must adduce some evidence to show it. *Deshon v. Merchants' Ins. Co.*, 11 Metc. (Mass.) 199, 207; *Wilson v. Hampden F. Ins. Co.*, 4 R. I. 159, 172 (semble).

<sup>84</sup> *Meagley v. Hoyt*, 125 N. Y. 771.

<sup>85</sup> *Cass v. B. & L. R. Co.*, 14 Allen (Mass.) 448; *Coffin v. Grand Rapids Hydraulic Co.*, 136 N. Y. 655; *Hodges v. Wilkinson*, 111 N. C. 56, 17 L. R. A. 545; *Fairly v. Wappoo Mills*, 44 S. C. 227, 29 L. R. A. 215.

*Mistake.* *Burton v. Blin*, 23 Vt. 151; *Christ Church v. Beach*, 7 Wash. 65.

*Fraud, duress, and undue influence*, see §§ 43-45(a), *infra*.

*Illegality*, see § 57, *infra*.

*Infancy*, see § 33, *infra*.

*Coverture.* *Starratt v. Mullen*, 148 Mass. 570, 571 (semble); *Page v. Findley*, 5 Tex. 391. And see *Miller v. Shields*, 124 Ind. 166, 8 L. R. A. 406. *Contra*, *Dranguet v. Prudhomme*, 3 La. 83.

*Extension of time.* *Meents v. Reiken*, 42 Ill. App. 17, 18.

*Tender.* *McCalley v. Otey*, 99 Ala. 584, 42 A. S. R. 87; *North Pa. R. Co. v. Adams*, 54 Pa. 94, 93 A. D. 677.

*Payment*, see § 74, *infra*.

*Accord and satisfaction.* *American v. Rimpert*, 75 Ill. 228.

*Cancellation.* *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659, 67 A. S. R. 154.

*Release.* *Blanchard v. Young*, 11 Cush. (Mass.) 341; *Cooper v. Cooper*, 9 N. J. Eq. 566.

*Rescission.* *Sparks v. Sparks*, 51 Kan. 195, 200, 201; *Webber v. Dunn*, 71 Me. 331; *Gibson v. Vetter*, 162 Pa. 26, 28.

of breach of condition on the plaintiff's part is admitted, the

*Novation.* Studebaker Bros. Mfg. Co. v. Endom, 51 La. Ann. 1263, 72 A. S. R. 489. And see Hammon, Cont. p. 859.

*Res judicata.* Gillson v. Price, 18 Nev. 109. See, also, § 148, *infra*.

*Diminution of damages.* If defendant admits the breach, the burden of showing facts in diminution of the damages rests upon him. Costigan v. M. & H. R. Co., 2 Denio (N. Y.) 609; Oldham v. Kerchner, 79 N. C. 106, 28 A. R. 302.

*Cause for discharge of servant.* Milligan v. Sligh Furniture Co., 111 Mich. 629; Rhoades v. C. & O. R. Co., 49 W. Va. 494, 55 L. R. A. 170.

*Breach of warranty of title.* Underwood v. Wolf, 131 Ill. 425, 19 A. S. R. 40; Dorr v. Fisher, 1 Cush. (Mass.) 271; Gutta Percha & R. Mfg. Co. v. Wood, 84 Mich. 452; Day v. Raguet, 14 Minn. 273; Johnson v. Bowman, 26 Neb. 745; Robinson v. Bierce, 102 Tenn. 428, 47 L. R. A. 275; Brackenridge v. Claridge, 91 Tex. 527, 43 L. R. A. 593; Tacoma Coal Co. v. Bradley, 2 Wash. 600, 26 A. S. R. 890.

*Breach of condition.* Bliley v. Wheeler, 5 Colo. App. 287; Bowser v. Bliss, 7 Blackf. (Ind.) 344, 43 A. D. 93. But see cases cited in note 73, *supra*. If a contract gives the obligor the right to declare it void under certain conditions, the burden is on him, when sued for specific performance, to show the existence of the conditions giving him the right to terminate the contract. Deakin v. Underwood, 37 Minn. 98, 5 A. S. R. 327.

*Insurance.* Even though the statements made in an application for an insurance policy are warranted to be true, the burden of proving their falsity, in an action on the policy, rests on the defendant. Leete v. Gresham L. Ins. Soc., 7 Eng. Law & Eq. 578, 15 Jur. 1161 (semble); Mfrs. Acc. Indem. Co. v. Dorgan, 58 Fed. 945, 22 L. R. A. 620; Continental L. Ins. Co. v. Rogers, 119 Ill. 474; Nat. Ben. Ass'n v. Grauman, 107 Ind. 288; Phenix Ins. Co. v. Pickel, 119 Ind. 155, 12 A. S. R. 393; Chambers v. N. W. Mut. L. Ins. Co., 64 Minn. 495, 58 A. S. R. 549; Grangers' L. Ins. Co. v. Brown, 57 Miss. 308; Jones v. Brooklyn L. Ins. Co., 61 N. Y. 79; Redman v. Aetna Ins. Co., 49 Wis. 431. And see Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377; Golden Star Fraternity v. Conklin, 60 N. J. Law, 565, 41 L. R. A. 449. *Contra*, Sweeney v. Metropolitan L. Ins. Co., 19 R. I. 171, 61 A. S. R. 751. And see Geach v. Ingall, 14 Mees. & W. 95; Ashby v. Bates, 15 Mees. & W. 589; Huckman v. Fernie, 3 Mees. & W. 505, 514, 517; Roach v. Ky. Mut. Security Fund Co., 28 S. C. 431, 437. While this view does not prevail in Rhode Island, yet there is a presumption that the statements are true, which stands for proof, in the absence of evidence to the contrary. O'Rourke v. J. Hancock Mut. L. Ins. Co., 23 R. I. 457, 57 L. R.

burden of proving matter in avoidance of it rests on the plaintiff.<sup>86</sup>

If the contract set forth in the complaint and denied in the answer appears *prima facie* to be one which the statute of frauds requires to be in writing, the burden of showing either a writing or facts taking the case out of the operation of the statute rests on the plaintiff. Under these circumstances, the statute is not an affirmative defense to be proved by the defendant.<sup>87</sup>

**(d) Actions of tort.** In actions of tort, the burden of proof ordinarily rests on the plaintiff,<sup>88</sup> unless the defendant admits the act complained of, and pleads an affirmative defense, in which case the burden of proof rests on him.<sup>89</sup>

A. 496. In an action on a policy of insurance, the burden of proving nonperformance of a condition subsequent rests on the defendant. *Western Assur. Co. v. Mohlman*, 51 U. S. App. 577, 40 L. R. A. 561; *Jones v. U. S. Mut. Acc. Ass'n*, 92 Iowa, 652; *Royal Ins. Co. v. Schwing*, 87 Ky. 410; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; *Hodsdon v. Guardian L. Ins. Co.*, 97 Mass. 144, 93 A. D. 73; *Murray v. N. Y. L. Ins. Co.*, 85 N. Y. 236. *Contra*, *Rankin v. Amazon Ins. Co.*, 89 Cal. 203, 23 A. S. R. 460; *Wilson v. Hampden F. Ins. Co.*, 4 R. I. 159. The burden of proving the falsity of a representation lies on the insurer. *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416, 59 A. D. 192. Other insurance cases will be found in notes 82, 83, *supra*.

<sup>86</sup> *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 67 A. S. R. 900.

<sup>87</sup> *Jonas v. Field*, 83 Ala. 445; *Price v. Weaver*, 13 Gray (Mass.) 272, 274.

<sup>88</sup> *Broughton v. McGrew*, 39 Fed. 672, 5 L. R. A. 406; *State v. Housekeeper*, 70 Md. 162, 14 A. S. R. 340; *Phelps v. Cutler*, 4 Gray (Mass.) 137; *Newman v. Stein*, 75 Mich. 402, 13 A. S. R. 447; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 A. S. R. 625; *Clarendon Land I. & A. Co. v. McClelland*, 89 Tex. 483, 31 L. R. A. 669.

<sup>89</sup> *Ala. G. S. R. Co. v. Frazier*, 93 Ala. 45, 30 A. S. R. 28; *Corniff v. Cook*, 95 Ga. 61, 51 A. S. R. 55; *Moffet v. Moffet*, 90 Iowa, 442; *Tucker v. State*, 89 Md. 471, 46 L. R. A. 181; *Blake v. Damon*, 103 Mass. 199; *Michigan L. & I. Co. v. Deer Lake Co.*, 60 Mich. 143, 1 A. S. R. 491; *Fremont, E. & M. V. R. Co. v. Harlin*, 50 Neb. 698, 61 A. S. R. 578; *Blunt v. Barrett*, 124 N. Y. 117. Thus, a plea of justification in

(e) **Statute of limitations.** Unless it appears from the plaintiff's own pleadings that the cause of action is barred by statute of limitation, the statute, in some states, is an affirmative defense, and the burden of proving that the cause of action accrued beyond the statutory period rests on the defendant.<sup>90</sup> In other states, however, a contrary view is taken, and the plaintiff is accordingly required to prove, not only that he has a cause of action, but also that it accrued within the time limited by statute.<sup>91</sup> However this may be, if it appears *prima facie* that a substantive right accrued beyond the period allowed by statute for enforcing it, the burden lies on the party asserting the right to prove facts which will bring him within an exception in the statute, or otherwise defeat its operation against him.<sup>92</sup>

an action for defamation casts the burden of proof on the defendant. *Ransone v. Christian*, 56 Ga. 351; *Heilman v. Shanklin*, 60 Ind. 424; *Stith v. Fullinwider*, 40 Kan. 73; *Sibley v. Lay*, 44 La. Ann. 936; *Sperry v. Wilcox*, 1 Metc. (Mass.) 267; *Finley v. Wildner*, 112 Mich. 230.

The burden of showing facts in diminution of damages rests on defendant. *Karst v. St. P., S. & T. F. R. Co.*, 23 Minn. 401.

<sup>90</sup> *Wise v. Williams*, 72 Cal. 544, 548; *Haines v. Amerine*, 48 Ill. App. 570; *Combs v. Smith*, 78 Mo. 32, 40; *Duggan v. Cole*, 2 Tex. 381; *Goodell's Ex'rs v. Gibbons*, 91 Va. 608. And see *White v. Campbell*, 25 Mich. 463, 475; 6 Current Law, 484.

<sup>91</sup> *Hurst v. Parker*, 1 Barn. & Ald. 92; *Taylor v. Spears*, 6 Ark. 381, 44 A. D. 519 (semble); *Robinson v. State*, 20 Fla. 804 (criminal case); *Huston v. McPherson*, 8 Blackf. (Ind.) 562 (semble); *Pond v. Gibson*, 5 Allen (Mass.) 19, 81 A. D. 724; *Houston v. Thornton*, 122 N. C. 365, 65 A. S. R. 699. And see *Cook v. Cook*, 10 Helsk. (Tenn.) 464.

<sup>92</sup> *Apperson v. Pattison*, 11 Lea (Tenn.) 484; *Capen v. Woodrow*, 51 Vt. 106. *Contra*, *White v. Campbell*, 25 Mich. 463.

*Infancy.* *French v. Watson*, 52 Ark. 168; *Davidson v. Nicholson*, 59 Ind. 411; *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352.

*Overture.* *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352; *Edwards v. University*, 21 N. C. (1 Dev. & B. Eq.) 325.

*Acknowledgment or new promise.* *Moore v. Leseur*, 18 Ala. 606; *Taylor v. Spears*, 6 Ark. 381, 44 A. D. 519; *Stowell v. Fowler*, 59 N. H.

### § 9. Ascertainment of burden of adducing evidence.

Having considered the rules for ascertaining which party bears the burden of proof in its proper sense, those rules may now be stated that determine the necessity resting on a party of commencing or going forward with the trial by adducing evidence tending to support his own contentions or to overcome those of his adversary.

Ordinarily the burden of adducing evidence rests, at the beginning of the trial, on the party having the burden of convincing the jury of the facts in issue. He must therefore, at the opening of the trial, adduce evidence which tends to support his case.<sup>93</sup>

In exceptional cases, however, the burden of adducing evidence at the beginning of the trial may rest on the opponent of the party having the burden of proof, as where, for instance, from the facts pleaded by the proponent and admitted by the opponent, a presumption arises in favor of the former which makes a *prima facie* case. In this event the burden of adducing evidence does not rest on the proponent at the outset, but rests, on the contrary, on the opponent, and he must accordingly begin the trial by adducing evidence to overcome the proponent's *prima facie* case.<sup>94</sup>

585; *Parker v. Butterworth*, 46 N. J. Law, 244, 50 A. R. 407; *Stansbury v. Stansbury's Adm'rs*, 20 W. Va. 23.

*Part payment.* *Knight v. Clements*, 45 Ala. 89, 6 A. R. 693.

*Absence from state.* *Slocum v. Riley*, 145 Mass. 370, 371; *Phillips v. Holman*, 26 Tex. 276.

*Extension of time.* *Cook v. Cook*, 10 Heisk. (Tenn.) 464, 466.

*Concealment of facts.* *Bartelott v. International Bank*, 119 Ill. 259. Where the bar of the statute is sought to be avoided by the plaintiff in a suit for fraud on the ground that he failed to discover the facts until within the statutory period, the burden of proving notice before that time rests on the defendant. *Shannon v. White*, 6 Rich. Eq. (S. C.) 96, 60 A. D. 115. *Contra*, *Lexington & O. R. Co. v. Bridges*, 7 B. Mon. (Ky.) 556, 46 A. D. 528.

<sup>93</sup> Section 3, *supra*.

Saving these exceptional cases, the burden of adducing evidence rests at the outset, therefore, on the party having the burden of proof in the proper sense of the term. The only test for determining who has the burden of adducing evidence at any subsequent stage in the trial is the quantity, weight, or degree of evidence which has, up to that time, been introduced. If the proponent, at the outset, offers evidence merely sufficient to take his case to the jury, he discharges the burden of adducing evidence primarily resting on him, and it rests neither on him nor on his opponent.<sup>95</sup> If the proponent goes further, and adduces evidence which is not only sufficient to take the case to the jury, but such as to require a verdict in his favor in the absence of evidence in rebuttal, then the burden of adducing is cast on the opponent, who may in turn shift it back to the proponent by offering evidence of similar weight or degree in his own behalf; and this process may continue until all the evidence is in.<sup>96</sup>

It has been said that the burden of proof may be determined at the beginning of the trial by asking which party would lose if no evidence were introduced by either, and that it may be determined at any subsequent point in the trial by asking which party would lose if neither introduced more evidence.<sup>97</sup> This test seems to refer to the burden of going forward with the trial by adducing evidence, rather than to

<sup>94</sup> Note 4, *supra*.

<sup>95</sup> Sections 3(b), 4(b), *supra*.

<sup>96</sup> Section 4(b), *supra*.

<sup>97</sup> *Abrath v. N. E. R. Co.*, 11 Q. B. Div. 440, *Thayer, Cas. Ev.* 78; *Amos v. Hughes*, 1 *Moody & R.* 464; *Leete v. Gresham L. Ins. Soc.*, 7 *Eng. Law & Eq.* 578, 15 *Jur.* 1161; *Geach v. Ingall*, 14 *Mees. & W.* 95, 100; *Ala. G. S. R. Co. v. Frazier*, 93 *Ala.* 45, 30 *A. S. R.* 28, 36; *Kent v. White*, 27 *Ind.* 390, 392; *Veiths v. Hagge*, 8 *Iowa*, 163; *Royal Ins. Co. v. Schwing*, 87 *Ky.* 410; *McKenzie v. Or. Imp. Co.*, 5 *Wash.* 409, 419.

the burden of proof in the proper sense of the term;<sup>98</sup> but, even so, it is not a true test.<sup>99</sup> It is true that the party on whom the burden of adducing evidence rests must go forward with the trial, else he will lose, as a matter of law,<sup>100</sup> but this is the effect of a failure to discharge the burden, not a means of determining on whom the burden rests. As has just been said, the only way in which that question may be determined at the beginning of the trial, save in the exceptional cases above mentioned, is to ascertain who bears the burden of convincing the jury of the facts in issue; and the only way in which the burden of adducing evidence may be determined at any subsequent point in the trial is to ascertain the weight of the evidence which has, up to that time, been adduced.

(a) **Peculiar knowledge of facts.** If the truth as to a fact in dispute is peculiarly within the knowledge of one party, especially if the fact is a negative one, the burden of adducing evidence on that point usually rests on him, although, under other circumstances, the burden of adduction would rest on his adversary.<sup>101</sup> Thus, in prosecutions for violations of vari-

<sup>98</sup> See Thayer, *Prel. Treat. Ev.* 362, 377.

<sup>99</sup> See Wigmore, *Greenl. Ev.* § 144.

<sup>100</sup> Section 4(b), *supra*.

<sup>101</sup> Thayer, *Prel. Treat. Ev.* 359.

ENGLAND: *Clunnes v. Pezzey*, 1 Camp. 8.

UNITED STATES: *Selma, R. & D. R. Co. v. U. S.*, 139 U. S. 560, 567; *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 377, 378; *U. S. v. Hayward*, 2 Gall. 485, 498, Fed. Cas. No. 15,336.

ALABAMA: *Howard v. State*, 75 Ala. 27.

ARKANSAS: *Ft. Smith v. Dodson*, 51 Ark. 447, 14 A. S. R. 62; *Hopper v. State*, 19 Ark. 143.

CALIFORNIA: *Joost v. Craig*, 131 Cal. 504, 82 A. S. R. 374.

COLORADO: *Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co.*, 11 Colo. 223, 7 A. S. R. 226, 235.

ILLINOIS: *G. W. R. Co. v. Bacon*, 30 Ill. 347, 83 A. D. 199.

INDIANA: *Tea v. Gates*, 10 Ind. 164.

ous statutes regulating the sale of intoxicating liquor, the burden is on the defendant to show a license, if he has one, especially where the indictment does not allege its nonexistence;<sup>102</sup> and if the seller of liquor sues for the price, he has the burden of showing that he was duly licensed to sell.<sup>103</sup>

IOWA: *Swafford v. Whipple*, 3 G. Greene, 261, 54 A. D. 498; *Goodwin v. Provident Sav. L. Assur. Ass'n*, 97 Iowa, 226, 59 A. S. R. 411.

LOUISIANA: *Lovell v. Payne*, 30 La. Ann. 511.

MAINE: *Buswell v. Fuller*, 89 Me. 600.

MICHIGAN: *People v. Swineford*, 77 Mich. 573.

MINNESOTA: *Lake v. Minn. Masonic Relief Ass'n*, 61 Minn. 96, 52 A. S. R. 538.

NEW YORK: *Clark v. Miller*, 4 Wend. 628.

NORTH CAROLINA: *Govan v. Cushing*, 111 N. C. 458; *State v. Arnold*, 35 N. C. (13 Ired. Law) 184.

OREGON: *Shmit v. Day*, 27 Or. 110; *Weber v. Rothchild*, 15 Or. 385, 3 A. S. R. 162.

UTAH: *Herriman Irr. Co. v. Butterfield Min. Co.*, 19 Utah, 453, 51 L. R. A. 930.

WEST VIRGINIA: *Butler v. Thompson*, 45 W. Va. 660, 72 A. S. R. 838.

WISCONSIN: *Atkinson v. Goodrich Transp. Co.*, 69 Wis. 5, 14; *Hatchard v. State*, 79 Wis. 357.

See, however, *Brill v. St. Louis Car Co.*, 80 Fed. 909.

This rule applies in actions for negligence against carriers of passengers (§ 69a, *infra*), carriers of goods (§ 68d, *infra*), telegraph companies (§ 68c, *infra*), and bailees generally (§ 68a, *infra*), and also in actions against railroad companies for setting fires (§ 66d, *infra*).

In some cases it is held that a party's peculiar knowledge does not cast on him the burden of adducing evidence, in the sense that, if he fails to do so, he will lose as a matter of law, and that his failure to adduce evidence is merely a fact which may be considered against him in weighing the rest of the evidence. *Rex v. Burdett*, 4 Barn. & Ald. 95, 140; *State v. Wilbourne*, 87 N. C. 529. And see *Lisbon v. Lyman*, 49 N. H. 553. This construction of the rule is but another form of the presumption indulged against a party who fails to produce evidence peculiarly within his power. See §§ 37-42, *infra*.

<sup>102</sup> CANADA: *In re Barrett*, 28 U. C. Q. B. 559.

UNITED STATES: *Mugler v. Kan.*, 123 U. S. 623, 674; *U. S. v. Nelson*, 29 Fed. 202.

ARKANSAS: *Williams v. State*, 35 Ark. 430.



## ART. II. PRESUMPTIONS.

- A. Preliminary Considerations, § 10.
- B. Presumptions of Fact and of Law, § 11.
  - Presumptions of fact, § 12.
  - Presumptions of law, § 13.
    - (a) Conclusive presumptions.
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GEORGIA: *Sharp v. State*, 17 Ga. 290.  
 ILLINOIS: *Noecker v. People*, 91 Ill. 468.  
 INDIANA: *Shearer v. State*, 7 Blackf. 99.  
 KENTUCKY: *Haskill v. Com.*, 3 B. Mon. 342, 343.  
 MAINE: *State v. Crowell*, 25 Me. 171; *State v. Woodward*, 34 Me. 293.  
 MASSACHUSETTS: *Com. v. Dean*, 110 Mass. 357 (statute); *Com. v. Leo*, 110 Mass. 414 (statute); *Com. v. Tuttle*, 12 Cush. 502 (statute); *Com. v. Rafferty*, 133 Mass. 574 (statute); *Com. v. Curran*, 119 Mass. 206 (statute); *Com. v. Towle*, 138 Mass. 490 (statute).  
 MICHIGAN: *Smith v. Village of Adrian*, 1 Mich. 495.  
 MINNESOTA: *State v. Bach*, 36 Minn. 234.  
 MISSISSIPPI: *Thomas v. State*, 37 Miss. 353.  
 MISSOURI: *State v. Edwards*, 60 Mo. 490.  
 NEBRASKA: *Hornberger v. State*, 47 Neb. 40.  
 NEW HAMPSHIRE: *State v. Foster*, 23 N. H. 348, 55 A. D. 191.  
 NEW JERSEY: *Greeley v. Passaic*, 42 N. J. Law, 87; *Jackson v. Camden*, 48 N. J. Law, 89.  
 NORTH CAROLINA: *State v. Emery*, 98 N. C. 668.  
 OREGON: *State v. Cutting*, 3 Or. 260.  
 SOUTH CAROLINA: *Geuling v. State*, 1 McCord, 573.  
 WASHINGTON: *State v. Shelton*, 16 Wash. 590.  
 And see *State v. Richeson*, 45 Mo. 575, 579. *Contra*, *State v. Nye*, 32 Kan. 201; *Com. v. Thurlow*, 24 Pick. (Mass.) 374; *Com. v. Kimball*, 7 Metc. (Mass.) 304, 306; *Hepler v. State*, 58 Wis. 46. And see *State v. Woody*, 47 N. C. (2 Jones) 276.

The same rule applies in prosecutions for engaging in various trades and professions without a license. *Apothecaries Co. v. Bentley*, Ryan & M. 159; *Williams v. People*, 121 Ill. 84; *State v. Wilson*, 62 Kan. 621, 52 L. R. A. 679; *Wheat v. State*, 6 Mo. 455; *State v. Parsons*, 124 Mo. 436, 46 A. S. R. 457; *Sheldon v. Clark*, 1 Johns. (N. Y.) 513.

Where a prima facie case of sales of intoxicants in violation of a state law has been made out, the burden is on the accused to prove facts that will bring him within the protection of the interstate com-

## C. Evidential and Nonevidential Presumptions, § 15.

Evidential presumptions, § 16.

(a) Origin.

(b) Nature.

(c) Effect.

(d) Mode of establishing facts founding presumption.

Nonevidential presumptions, § 17. .

(a) Nature.

(b) Effect.

## D. Conflict of Presumptions, § 18.

Presumptions relating to burden of convincing jury, § 19.

Presumptions relating to burden of adducing evidence, § 20.

Conflict between presumptions relating to burden of convincing jury and those relating to burden of adducing evidence, § 21.

## A. PRELIMINARY CONSIDERATIONS.

## § 10. Presumption is the assumption or taking for granted

merce clause of the federal constitution. *Keith v. State*, 91 Ala. 2, 10 L. R. A. 430; *State v. Chapman*, 1 S. D. 414, 10 L. R. A. 432.

In a prosecution under the game laws, the burden is on the accused to show that he was qualified to do the act complained of. *Rex v. Turner*, 5 Maule & S. 206. And see *Smyth v. Jefferies*, 9 Price, 257.

If it is essential to show want of authority on the part of a third person, the burden of proof is on the state, since in this event the truth is not peculiarly within the accused's knowledge. *Weaver v. State*, 89 Ga. 639. Thus, in a prosecution for carrying liquor to a town with reason to believe that it was to be sold there in violation of law, the burden is on the commonwealth to show that the town did not authorize the sale of such liquor. *Com. v. Babcock*, 110 Mass. 107; *Com. v. Locke*, 114 Mass. 288. It has been held, however, that, in a prosecution for cutting timber without the owner's consent, the burden of proving consent rests on the accused. *Welsh v. State*, 11 Tex. 368. And the same rule has been applied in a prosecution for selling intoxicants to a minor student without the consent of the parent or guardian. The burden of showing consent was held to be on the accused. *Farrall v. State*, 32 Ala. 557. See, however, as tending to the contrary, *Conyers v. State*, 50 Ga. 103, 15 A. R. 686; *State v. Evans*, 50 N. C. (5 Jones) 250.

<sup>102</sup> *Solomon v. Dreschler*, 4 Minn. 278; *Bliss v. Brainard*, 41 N. H. 256. And see *Garland v. Lane*, 46 N. H. 245; *Kane v. Johnston*, 9 Bosw. (N. Y.) 154. *Contra*, *Wilson v. Melvin*, 13 Gray (Mass.) 73;

of an unknown fact.<sup>1</sup> It does not involve an exercise of the rational faculty with reference to the fact assumed, but is indulged, for the sake of convenience, to aid and shorten inquiry and argument. It is thus distinguished from inference, which assumes nothing, and takes nothing for granted, but is a reasoning or logical process involving deduction or induction. This distinction between presumption and inference should be borne in mind throughout this discussion.

Presumptions are "closely related to the subject of judicial notice; for they furnish the basis of many of those spontaneous recognitions of particular facts or conditions which make up that doctrine."<sup>2</sup> They differ from judicial notice, however, in this: In the case of judicial notice, the absolute truth of the fact in question is recognized without evidence. There is no assumption in the process. The court knows the truth, and acts accordingly. If the court does not in fact have knowledge of the truth, and can find no means to inform itself, it cannot take judicial notice of the fact in dispute, even though it is a proper subject of judicial notice. In the case of presumption, on the other hand, the truth of the fact in question is unknown, and is for the moment immaterial. Absolutely or tentatively, the fact is assumed. Judicial notice is therefore not assumption, but recognition; and presumption, on the other hand, is not recognition, but assumption.

While presumptions are ordinarily regarded as belonging

*Pratt v. Langdon*, 97 Mass. 100. And see *Craig v. Proctor*, 6 R. I. 547; *Barton v. Sutherland*, 5 Rich. Law. (S. C.) 57.

In an action by the proprietors of a theater against an actor for breach of contract, evidence that performances have gone on without interruption by the municipal authorities is *prima facie* evidence that the theater was duly licensed. *Rodwell v. Redge*, 1 Car. & P. 220.

<sup>1</sup> *Ward v. Metropolitan L. Ins. Co.*, 66 Conn. 227, 50 A. S. R. 80.

<sup>2</sup> *Thayer*, Prel. Treat. Ev. 314.

peculiarly to the law of evidence, they belong, in strict propriety, to the wider field of legal reasoning in its application to particular subjects. They "are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some given inquiry. They may be grounded on general experience, or probability of any kind, or merely on policy and convenience. On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of it, by taking something for granted,—by assuming its existence." In themselves, however, they are not evidence,<sup>3</sup> though, for the time being they accomplish the result of evidence. They are simply a process which aids and shortens inquiry and argument. They relate to the whole field of argument, whenever and by whomsoever conducted, and also to the whole field of the law, in so far as it has been shaped and is being shaped by the process of reasoning. The subject of presumptions is therefore one of universal application in the law, both as regards the subjects to which it relates and the persons who apply it.<sup>4</sup>

<sup>3</sup> Thayer, *Prel. Treat. Ev.* 314; *Sturdevant's Appeal*, 71 Conn. 398, *Thayer, Cas. Ev.* 95, 96; *McGinnis v. Kempsey*, 27 Mich. 363; *Lisbon v. Lyman*, 49 N. H. 553. And see cases cited in notes 33, 53, *infra*.

It has been said that the "legal presumption of innocence is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled." 1 *Greenl. Ev.* § 34; *Coffin v. U. S.*, 156 U. S. 432; *Lillenthal's Tobacco v. U. S.*, 97 U. S. 237, 267; *Bryant v. State*, 116 Ala. 445; *Ellis v. Buzzell*, 60 Me. 209, 11 A. R. 204. This statement is inaccurate and misleading, however, since presumptions are not evidence, but are merely rules that concern the burden of proof, in some sense of that term. *Thayer, Prel. Treat. Ev.* 337; *State v. Smith*, 65 Conn. 283; *State v. Nicholls*, 50 La. Ann. 699, 706; *Morehead v. State*, 34 Ohio St. 212. And see *Agnew v. U. S.*, 165 U. S. 36, 51.

<sup>4</sup> *Thayer, Prel. Treat. Ev.* 314. Thus, to quote again from the same author: "When it is said that, if persons contract for the sale of a specific chattel, it is presumed that the title passes; and that, when

While presumptions are not a part of the law of evidence in the proper sense of the term, yet many of them vitally concern it in that they fix upon the party against whom they operate the burden of proof in some sense of that term. These it is the present purpose to consider.

B. PRESUMPTIONS OF FACT AND OF LAW.

§ 11. Presumptions are commonly classified as presumptions of fact and presumptions of law, the latter being subdivided into conclusive and disputable presumptions.

Many presumptions may be regarded as presumptions of fact or presumptions of law, and as conclusive or disputable presumptions, according to the number of facts which are conceived of as giving rise to them. A presumption which, stated in general terms, is one of fact, may, when more basic facts are added, resolve into a presumption of law, and vice versa. So, a presumption of law which, stated in general terms, is conclusive, may resolve into a disputable presumption by the introduction of additional fundamental facts, and vice versa. This consideration may serve to account for some apparent conflict in the cases as to the nature of various presumptions. It will sometimes be found that cases holding a presumption to be one of fact, or holding a presumption of law to be rebuttable, are in conflict with cases in terms holding the contrary, simply because they introduce additional facts as a basis of their holding, and vice versa.

a man voluntarily kills another, without any more known or stated, it is presumed to be murder; and that, when a written communication to another is put in the mail, properly addressed, and postage prepaid, it is presumed that the other receives it; and that, when one has been absent seven years, and no knowledge of him had by those who would naturally know, death is presumed,—in these cases, rightly considered, we have particular precepts in the substantive law of so many different subjects,—of property, of homicide, of notice, and of persons." Prel. Treat. Ev. 327.

## § 12. Presumptions of fact.

Presumptions of fact or natural presumptions are based on indirect or circumstantial evidence. They are inferences as to the existence of an unknown fact, drawn, without reference to rules of law, from given facts and circumstances of which evidence has been adduced. They assume nothing, take nothing for granted, and are reached only by a process of reasoning. It is this that distinguishes them from presumptions of law, for these are more or less arbitrary assumptions as to the existence of an unknown fact which are sanctioned by rules of law, and do not depend upon a process of reasoning.<sup>5</sup> Presumptions of fact are therefore not true presumptions, "but mere arguments," says Professor Greenleaf,<sup>6</sup> "of which the major premise is not a rule of law. They belong equally to any and every subject-matter, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. They depend upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect: that while those are reduced to fixed rules, and constitute a branch of the particular system of jurisprudence to which they belong, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case, by means of the common experience of man-

<sup>5</sup> *Rex v. Burdett*, 4 Barn. & Ald. 95, 161; *U. S. v. Searcey*, 26 Fed. 435; *Sutphen v. Cushman*, 35 Ill. 186; *Oxier v. U. S.*, 1 Ind. T. 85; *Leighton v. Morrill*, 159 Mass. 271; *Gulick v. Loder*, 13 N. J. Law, 68, 23 A. D. 711, 713; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *First Nat. Bank v. Commercial Assur. Co.*, 33 Or. 43, 53; *Randall v. Collins*, 52 Tex. 435. *Contra*, *Campbell v. State*, 150 Ind. 74.

<sup>6</sup> 1 Greenl. Ev. §§ 44, 48. And see, generally, 7 Current Law, 1515.

Hammon, Ev.—4.

kind, without the aid or control of any rules of law whatever. \* \* \* These presumptions remain the same in their nature and operation, under whatever code the legal effect or quality of the facts, when found, is to be decided." "In fine," he continues, "this class of presumptions embraces all the connections and relations between the facts proved and the hypothesis stated and defended, whether they are mechanical and physical, or of a purely moral nature. It is that which prevails in the ordinary affairs of life, namely, the process of ascertaining one fact from the existence of another, without the aid of any rule of law," and therefore it falls within the exclusive province of the jury, who are bound to find according to the truth.<sup>7</sup>

The term presumption of fact is sometimes applied to disputable presumptions as a class, as if no presumptions of law were rebuttable.<sup>8</sup> This is a misuse of the term. It is true that presumptions of fact, being nothing but inferences from circumstantial evidence, are rebuttable, but many presumptions of law are rebuttable as well.

Another common error is that which ascribes to a given presumption all the attributes of a presumption of law, and yet calls it a presumption of fact; as where it is said that a certain presumption shifts the burden of adducing evidence on the party against whom it operates, and, in the absence of evidence in rebuttal, requires a verdict against him, and yet that it is a presumption of fact.<sup>9</sup>

<sup>7</sup> See § 14, *infra*, as to province of court and jury.

<sup>8</sup> *Huntley v. Whittier*, 105 Mass. 391, 7 A. R. 536; *Ham v. Barret*, 28 Mo. 388.

<sup>9</sup> *Pickup v. Thames & M. M. Ins. Co.*, 3 Q. B. Div. 594, *Thayer, Cas. Ev.* 106, 109; *The Bronx*, 86 Fed. 808; *Ham v. Barret*, 28 Mo. 388; *Com. v. Gerade*, 145 Pa. 289, 27 A. S. R. 689, 692; *Stover v. Duren*, 3 Strob. (S. C.) 448, 51 A. D. 634; *McQueen v. Fletcher*, 4 Rich. Eq. (S. C.) 152.

## § 13. Presumptions of law.

Presumptions of law, sometimes termed legal or artificial presumptions, are assumptions as to the existence of an unknown fact. They rest on rules of law, and do not call for an exercise of the rational faculty. It is this that distinguishes them from presumptions of fact, which are mere inferences reached by deduction or induction.<sup>10</sup> Presumptions of law are generally classified as conclusive or disputable.

(a) **Conclusive presumptions.** Conclusive, absolute, or imperative presumptions establish in law beyond dispute the fact whose existence they assume, and evidence is not admissible to disprove it. Neither court nor jury may ignore it, nor infer anything inconsistent with it.<sup>11</sup>

To say that a fact shall be conclusively assumed to exist, and that evidence shall not be received to dispute that assumption, is an oblique way of saying that the nonexistence of the fact is immaterial,—that the rule of law concerning the subject in dispute is the same whether the fact does or does not exist.<sup>12</sup> Accordingly, the law, in making the presumption conclusive, takes it out of the domain of evidence into that of the substantive law. For instance, there is a presumption of law that a child under seven years of age is incapable of committing crime; that is to say, evidence that a person accused of crime is under seven is equivalent to evidence that he is without capacity to commit crime. Now, if this were a disputable presumption, evidence would be admissible to overcome it, and the rule would relate to the law of evidence

<sup>10</sup> *Gulick v. Loder*, 13 N. J. Law, 68, 23 A. D. 711, 713; *Lee v. Pearce*, 68 N. C. 76, 84. And see cases cited in note 5, *supra*.

<sup>11</sup> *Hardy's Case*, 24 How. State Tr. 1361, Thayer, Cas. Ev. 44; *Tooke's Case*, 25 How. State Tr. 1, Thayer, Cas. Ev. 44; *McCagg v. Heacock*, 34 Ill. 476, 85 A. D. 327.

<sup>12</sup> *State v. Platt*, 2 Rich. Law (S. C.) 150, 154.



in that it would fix the burden of adducing evidence of criminal capacity. Being a conclusive presumption, however, evidence is not admissible to show that an accused under seven is capable of committing crime. No burden of adduction is fixed; the presumption is purely a rule of substantive law. It has no more to do with evidence than the equally settled rule that an infant is incapable in law of absolutely binding himself by contract.

A distinction sometimes overlooked may be noted here between rebutting a presumption and disproving the facts on which it is founded. When it is said that a presumption is conclusive, and not rebuttable, it is not meant that the party against whom the presumption operates cannot disprove the facts which give rise to it. All that is meant is that he cannot disprove the fact which the presumption assumes to exist. All presumptions, whether conclusive or rebuttable, are subject to attack on the ground that one or more of the facts essential to their being do not in truth exist.

(b) **Disputable presumptions.** Disputable or rebuttable presumptions, as their name implies, are opposed to conclusive presumptions, in that evidence is admissible to disprove the fact which they assume to exist. Their only effect is to cast on the party against whom they operate the burden of proof in one or the other of the two meanings of that term.<sup>13</sup> If, however, this evidence in rebuttal is not given, then they stand for conclusive proof of the assumed fact, and the court will give them effect accordingly.<sup>14</sup>

#### § 14. Presumptions for jury and for court.

The decision of the facts in issue is, as a rule, the peculiar

<sup>13</sup> Sections 16(c), 17(b), *infra*.

<sup>14</sup> *Kidder v. Stevens*, 60 Cal. 414; *Bush v. Barnett*, 96 Cal. 202. See, also, §§ 16(c), 17(b), *infra*.

province of the jury. This duty is not affected by the so-called presumption of fact. Such a presumption, as has been seen, is a mere inference which the jury may or may not draw, as to them seems proper. "They are usually aided in their labors by the advice and instructions of the judge, more or less strongly urged, at his discretion; but the whole matter is free before them, unembarrassed by any considerations of policy or convenience, and unlimited by any boundaries but those of truth, to be decided by themselves, according to the convictions of their own understanding."<sup>15</sup>

Presumptions of law stand on another plane. Questions of law are generally a matter within the exclusive province of the court; with them the jury have nothing to do further than to obey the court's instructions concerning them. Now, presumptions of law are based on rules of law pure and simple. Whether the fact assumed in a presumption of law is justified as a logical inference from the facts in evidence is a matter of no moment. The questions, when do the facts in evidence give rise to a presumption of law? and, what effect shall be given to the presumption? are therefore questions addressed to the court alone, and the jury must abide by the court's instructions concerning them.<sup>16</sup>

<sup>15</sup> 1 Greenl. Ev. § 48; *Crane v. Morris' Lessee*, 6 Pet. (U. S.) 598; *U. S. v. Searcey*, 26 Fed. 435; *People v. Messersmith*, 61 Cal. 246; *Jenkins v. Jenkins*, 83 Ga. 283, 20 A. S. R. 316, 319; *Cartier v. Troy Lumber Co.*, 138 Ill. 533; *Graves v. Colwell*, 90 Ill. 612; *State v. Richart*, 57 Iowa, 245; *Erhart v. Dietrich*, 118 Mo. 418; *Ham v. Barret*, 28 Mo. 388; *Stover v. People*, 56 N. Y. 315, 317; *Justice v. Lang*, 52 N. Y. 323; *Brown v. Schock*, 77 Pa. 471; *Sullivan v. Phila. & R. R. Co.*, 30 Pa. 234, 72 A. D. 698, 699. *Contra*, *Campbell v. State*, 150 Ind. 74.

If the facts are not sufficient in law to justify a presumption of fact, i. e., an inference as to the existence of the fact in issue, then the decision of the case becomes a question for the court, whose duty it is to dispose of the case by dismissal or nonsuit, or by directing a verdict. See § 3, *supra*.

<sup>16</sup> *Thayer*, Prel. Treat. Ev. 212; *Sun Mut. Ins. Co. v. Ocean Ins. Co.*,

This therefore seems to be the vital distinction between presumptions of fact and those of law. One does not, and the other does, make a *prima facie* case which, in the absence of evidence in rebuttal, requires a verdict in favor of the party for whom it operates. One is for the jury alone. The other is for the court alone. Terms for these more clearly descriptive would therefore seem to be, "presumptions for the jury" and "presumptions for the court," respectively.

It is not only the right of the court, but also its duty, to instruct the jury with reference to the presumptions of law applicable to the case on trial, distinguishing between disputable and conclusive presumptions.<sup>17</sup> This rule, however, is to be taken with some qualifications. As will subsequently be seen, certain kinds of presumptions may be said to fix the burden of proof in that sense of the term which imposes on a party the necessity of convincing the jury of the existence of the facts essential to his case.<sup>18</sup> It will also be seen that pre-

107 U. S. 485, 502; *U. S. v. Searcey*, 26 Fed. 435; *McArthur v. Carrie's Adm'r*, 32 Ala. 75, 70 A. D. 529, 537; *Jenkins v. Jenkins*, 83 Ga. 283, 20 A. S. R. 316, 319; *State v. Richart*, 57 Iowa, 245; *Stover v. People*, 56 N. Y. 315, 317; *Gregory v. Com.*, 121 Pa. 611, 6 A. S. R. 804; *Sullivan v. Phila. & R. R. Co.*, 30 Pa. 234, 72 A. D. 698, 700; *Cope v. Humphreys*, 14 Serg. & R. (Pa.) 15; *Yarnell v. Moore*, 3 Cold. (Tenn.) 173.

Whether evidence offered to rebut a presumption has in law a tendency to rebut it is a question for the court. *Sullivan v. Phila. & R. R. Co.*, 30 Pa. 234, 72 A. D. 698, 700. If it has this tendency, then the question whether the fact assumed by the presumption to exist does exist in truth is a question for the jury on all the evidence. See §§ 16(c), 17(b), *infra*. See, however, *Gregory v. Com.*, 121 Pa. 611, 6 A. S. R. 804. The evidence adduced in rebuttal may, however, be so strong as to make a *prima facie* case in favor of the party introducing it, in which event the court must dispose of the case as a matter of law. *Louisville & N. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 50 L. R. A. 620.

<sup>17</sup> *People v. De Fore*, 64 Mich. 693, 8 A. S. R. 863; *Graham v. Hawkins*, 38 Tex. 628.

sumptions of all sorts may make a *prima facie* case, and thus cast on the adverse party the necessity of going forward with the trial by adducing evidence tending to disprove the fact assumed;<sup>19</sup> and that, when evidence in rebuttal is introduced, the presumption becomes *functus officio*, and disappears, leaving the question of the existence of the fact which it assumed to exist to be determined by the jury upon all the evidence.<sup>20</sup> Now, when a presumption relates, not to the burden of convincing the jury, but to the burden of adducing evidence merely, and evidence tending to rebut it has been introduced, it would seem that, as to this presumption, the jury ought to receive no instructions, since, as has just been said, the presumption has served its purpose when rebutting evidence is introduced, and it thereupon vanishes, and is of no further effect.<sup>21</sup>

#### C. EVIDENTIAL AND NONEVIDENTIAL PRESUMPTIONS.

§ 15. With regard to their immediate basis, presumptions may be divided into two classes: (1) Those derived from evidential facts which are deemed the legal equivalent of the fact assumed to exist; (2) those derived, not from evidential facts, but solely from reasons of justice, policy, or expediency.<sup>22</sup> To give rise to presumptions of the first class, the party invoking them must first adduce evidence of the fundamental facts on which they rest. Their immediate basis is the state of facts thus proved. It is only in a general and remote sense that they are founded on experience, justice,

<sup>18</sup> Section 17(b), *infra*.

<sup>19</sup> Sections 16(c), 17(b), *infra*.

<sup>20</sup> Sections 16(c), 17(b), *infra*.

<sup>21</sup> *Mo. Pac. R. Co. v. Brazzil*, 72 Tex. 233.

<sup>22</sup> A nonevidential presumption is sometimes based also on the difficulty of obtaining information as to the fact assumed. *Tampa Water works Co. v. Cline*, 37 Fla. 586, 33 L. R. A. 376.

policy, or convenience. The rules giving rise to them are thus founded, but not the presumptions themselves. Thus, to give rise to the presumption of death, the party invoking it must prove that the person whose death is in question has been absent, unheard of, for seven years, since it is on these evidentiary facts that the presumption rests. The immediate basis of presumptions of the second class, on the other hand, is experience, justice, policy, or convenience, and no evidentiary facts need be proved to bring them into being. To give rise to the presumption of innocence, for instance, no fact need be proved, since the presumption rests, not on evidentiary facts, but immediately on a principle of natural justice.<sup>23</sup>

The immediate operation of presumptions of the first class is to fix the probative value of evidentiary facts by virtue of rules of equivalence. They are a development of indirect or circumstantial evidence, and are the result of rules of law by which a known set of evidentiary facts necessitates, more or less arbitrarily, an assumption of the existence of a fact which is unknown. Standing thus for evidence of the unknown fact, as they do, they cast on the party against whom they operate the necessity of adducing evidence to disprove the fact so assumed; but this is their indirect, not their immediate, effect. Thus, the presumption of death results from a rule making the fact of a person's absence, unheard of, for seven years, the legal equivalent of his death. Incidentally, this rule of equivalence casts on the party disputing the fact of death the necessity of adducing evidence tending to disprove it. The immediate operation of presumptions of the second class, on the other hand, is to cast on the party against whom they operate the burden of disproving, or of adducing evidence tending to disprove, the fact thus assumed to exist. This is their only effect. Rules of equivalence they do not fix. They relate to

<sup>23</sup> *Hyde Park v. Canton*, 130 Mass. 505, 508.

the burden of proof alone. The presumption of innocence, for instance, does not rest on any state of facts which is made the legal equivalent of innocence. It is based immediately upon a principle of natural justice, and its sole effect is to cast on the state the burden of establishing guilt. It is thus seen that, while the ultimate effect of these two classes of presumptions may be the same, yet their immediate operation is different.

Presumptions of the first class are the outgrowth of circumstantial or indirect evidence, and they are closely related to it. Presumptions of the second class are not a development of any sort of evidence, but are "general maxims of legal reasoning, having no peculiar relation to the law of evidence."<sup>24</sup> For want of better terms, these two classes may therefore be called "evidential" and "nonevidential" presumptions, respectively.<sup>25</sup>

These two classes of presumptions differ in origin and development, and in some respects in their practical effect, and the distinction between them proves helpful in dealing with the so-called conflict of presumptions.

### § 16. Evidential presumptions.

(a) **Origin.** Evidence is either direct or indirect. Direct evidence is that which authenticates the ultimate fact, that

<sup>24</sup> See Thayer, *Prel. Treat. Ev.* 335.

<sup>25</sup> Evidential and nonevidential presumptions seem to correspond with the special and general presumptions, respectively, mentioned in *Best, Ev. (Int. Ed.)* § 331. Nonevidential presumptions have been called spurious because they have "nothing to do with evidence or inference." McKelvey, *Ev.* p. 78. So far as having to do with inference is concerned, no true presumption has anything to do with that; and so far as having to do with evidence is concerned, this is not a test of the genuineness of a presumption. As Professor Thayer has said, presumptions "relate to the whole field of argument, wherever and by whomsoever conducted; and also to the whole field of the law, in so far as it has been shaped and is being shaped by the process of reasoning." *Prel. Treat. Ev.* 314.

is, the very fact in issue; as where, on a murder trial, a witness testifies that he saw defendant stab the deceased, who immediately died. Indirect evidence is that which authenticates, not the ultimate fact, but evidentiary facts, that is, facts from which an inference may be drawn of the existence of the ultimate fact; as if, in the illustration just given, the witness should testify, not that he saw defendant stab the deceased, but that he saw him draw a knife from deceased's side, fling it into a river near by, and hurry away, the knife afterwards being found and identified as defendant's. Direct evidence appeals only to the belief of the jury. Indirect evidence, on the other hand, appeals, first, to the belief of the jury; and, second and characteristically, to their reason. If direct evidence is believed, the jury can but find that the fact in issue exists. Their belief in the truth of indirect evidence does not thus dispose of the matter; in spite of that belief, they may decline to infer the existence of the ultimate fact.

Evidential presumptions are a development of indirect evidence. In the mass of cases that came before the courts for trial, it was inevitable that certain evidentiary facts should often recur. The effect of these as evidence of the ultimate fact in issue was originally, in all cases, a matter of inference, —a question of fact to be determined by the jury under appropriate instructions from the court; but when case after case had presented itself with like evidentiary facts, it was only natural that the courts should begin to advise the jury as to the inference which they might draw from those facts. At first, no more was done than to inform the jury that they "might" draw a particular inference from the facts in evidence. Later it was told them that that inference "ought" to be drawn. And it finally came about that the jury were instructed that that inference "must" be drawn.<sup>26</sup> Now, when

<sup>26</sup> Thayer, Prel. Treat. Ev. 317.

this stage was reached, as it was reached in many cases, what had theretofore been an inference—the result of the exercise of the rational faculty—became a conclusion of law, dependent in no wise upon the jury's view of its propriety; in other words, what was originally an inference became a presumption,—an assumption or a taking for granted under the sanction of the law.<sup>27</sup> In this manner, evidential presumptions came into being.

(b) **Nature.** Evidential presumptions are assumptions of fact sanctioned by rules of law which establish the equivalence of a known evidentiary fact or group of facts with an unknown ultimate fact.<sup>28</sup> Thus, if it is proved, on a trial for bigamy, for instance, that the former spouse had, at the time of the accused's second marriage, been absent and unheard of for seven years, a presumption arises that he or she was then dead. Known absence, without tidings, for seven years, is thus made

"Cases with common features constantly recur, and the best mode of dealing with them may be learned by experience." *Saunders v. Saunders* [1897] Prob. Div. 89, 94.

<sup>27</sup> "Matter, logically evidential, [thus becomes] the subject of a rule which directly, although only *prima facie*, annexes to it legal consequences belonging to the facts of which it is evidence; and this rule takes its place in the substantive law as a subsidiary proposition, alongside of the main and fundamental one, as an aid in the application of it. The law \* \* \* is always growing in this way, through judicial determinations, for the application of the ultimate rule of the substantive law has to be made by reasoning; and this process is forever discovering the identity, for legal and practical purposes, of one state of things with some other. Many facts and groups of facts often recur; and when a body of men, with a continuous tradition, has carried on for some length of time this process of reasoning upon facts that often repeat themselves, they cut short the process and lay down a rule. To such facts they affix, by a general declaration, the character and operation which common experience has assigned to them." *Thayer, Prel. Treat. Ev.* 326<sup>9</sup>

<sup>28</sup> *McArthur v. Carrie's Adm'r*, 32 Ala. 75, 70 A. D. 529, 537; *Tanner v. Hughes*, 53 Pa. 289.



the legal equivalent of the unknown fact as to death. This fixing of equivalence between facts is the characteristic feature of this sort of presumption.

Presumptions of fact, so called, must be distinguished in the present connection, since they are mere inferences unaffected by rule of law. From a set of known evidentiary facts the jury may, it is true, draw an inference as to the existence of the unknown ultimate fact, and thus, to their minds, an equivalence in the particular case may exist. But this equivalence is not fixed by law, and it may not exist for different juries in like cases. It is therefore not a rule, but only an isolated process.

Evidential presumptions are sometimes defined as arbitrary inferences which the law requires the court and jury to draw from known facts,<sup>29</sup> but such a definition is not accurate. In policy, indeed, these presumptions are generally founded "either upon the first principles of justice, or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things";<sup>30</sup> but they are not inferences. An exercise of the rational faculty is not needed to give them effect. Indeed, an exercise of this faculty is precluded, not required, by the rules of presumption. When the prescribed evidentiary facts become known, they are accorded by these rules a certain effect in dispensing, either tentatively or absolutely, with further evidence of the ultimate fact. In other words, the court and jury are bound to assume (not to infer) the existence of the ultimate fact, whatsoever conclusion they might come to if

<sup>29</sup> Stephens, Dig. Ev. art. 1; *Ulrich v. Ulrich*, 136 N. Y. 120, 123.

<sup>30</sup> 1 Greenl. Ev. § 15; *U. S. v. Searcey*, 26 Fed. 435; *Judson v. Giant Powder Co.*, 107 Cal. 549, 556, 48 A. S. R. 146, 150; *McCagg v. Heacock*, 34 Ill. 476, 85 A. D. 327; *Wilson v. Hayes*, 40 Minn. 531, 12 A. S. R. 754, 759.

they were left to decide the matter by drawing inferences from the known evidentiary facts independently of the rule of presumption.<sup>21</sup> A rule of presumption, therefore, establishes the equivalence of certain facts, so that, when one fact becomes known, the other must be assumed to exist, either absolutely or until evidence tending to prove its nonexistence is adduced by the party against whom the presumption operates.

(c) **Effect.** Evidential presumptions rest on rules making a known set of facts the legal equivalent of an unknown fact, in the absence of evidence to the contrary. Until evidence in rebuttal is adduced by the party against whom they operate, they therefore take the place of evidence, and stand for *prima facie* proof of the fact assumed to exist. This is their primary effect. Incidentally they cast the burden of adducing evidence in rebuttal on the party against whom they operate, requiring him to go forward with the trial. If he fails to do this, then the presumption stands for absolute proof, and, if

<sup>21</sup> "To say, as sometimes happens, that in such cases there is 'a rule of law that courts and judges shall draw a particular inference,' is a loose and misleading expression, for it involves the misconception that the law has any rules at all for conducting the process of reasoning. It would be accurate to say that the rule of law requires a judge to stop short in the process of drawing inferences, or not to enter upon it at all; to assume for the time that one fact is, in legal effect, the same as a certain other. The rule fixes the legal effect of a fact,—its legal equivalence with another; and it makes no difference, in the essential nature of the rule, whether this effect is fixed absolutely or *prima facie*: it gives a legal definition. Such is the nature of all rules to determine the legal effect of facts as contrasted with their logical effect. To prescribe and fix a certain legal equivalence of facts is a very different thing from merely allowing that meaning to be given to them. A rule of presumption does not merely say that such and such a thing is a permissible and usual inference from other facts, but it goes on to say that this significance shall always, in the absence of other circumstances, be imputed to them; sometimes passing first through the stage of saying that it *ought to be* imputed." Thayer, *Prel. Treat. Ev.* 316.

the fact thus assumed to exist is the only fact in issue, he will lose as a matter of law. Under such circumstances, it is the court's duty to enter a nonsuit or dismissal, or to direct a verdict against the party against whom the presumption operates.<sup>32</sup>

If, on the other hand, the party against whom a presumption operates takes up the burden thus cast on him, and adduces evidence tending to disprove the fact assumed to exist, the presumption is dispelled. It becomes *functus officio*, and has no further effect in the trial, and all the evidence concerning the fact assumed to exist, including the evidence of those facts which gave rise to the presumption, is to be considered together as a whole, without reference to any presumption. From this mass of evidence the jury are to find the truth as to the fact formerly assumed to exist, unhampered by any arbitrary rule, and guided only by reason.<sup>33</sup>

These remarks apply only to disputable presumptions of law. Presumptions of fact, so called, do not make a *prima facie* case which casts the burden of adducing evidence on

<sup>32</sup> Thayer, *Prel. Treat. Ev.* 336; *Banbury Peerage Case*, 1 Sim. & S. 153, Thayer, *Cas. Ev.* 45; *Lincoln v. French*, 105 U. S. 614; *McArthur v. Carrie's Adm'r*, 32 Ala. 75, 70 A. D. 529, 537; *Metropolitan St. R. Co. v. Powell*, 89 Ga. 601; *Adams' Ex'rs v. Jones' Adm'r*, 39 Ga. 479; *Knisely v. Sampson*, 100 Ill. 573; *Graves v. Colwell*, 90 Ill. 612; *Adams v. Slate*, 87 Ind. 573; *Bates v. Prickett*, 5 Ind. 22, 61 A. D. 73; *Market & F. Nat. Bank v. Sargent*, 85 Me. 349, 35 A. S. R. 376; *Tanner v. Hughes*, 53 Pa. 289; *Thomson v. Porter*, 4 Strob. Eq. (S. C.) 58, 53 A. D. 653; *Hale v. Pack's Ex'rs*, 10 W. Va. 145. See, also, § 4, *supra*.

<sup>33</sup> Thayer, *Prel. Treat. Ev.* 346; *Anderson v. Morice*, L. R. 10 C. P. 58; *Jones v. Bond*, 40 Fed. 281, Thayer, *Cas. Ev.* 94; *Gibson v. International Trust Co.*, 177 Mass. 100, 52 L. R. A. 928; *Huntley v. Whittier*, 105 Mass. 391, 7 A. R. 536; *Adair v. Adair*, 5 Mich. 204, 71 A. D. 779, 784; *Jackson v. Sackett*, 7 Wend. (N. Y.) 94; *Sullivan v. Phlla. & R. R. Co.*, 30 Pa. 234, 72 A. D. 698; *Trumble v. Ter.*, 3 Wyo. 280, 6 L. R. A. 384. See, however, *Graves v. Colwell*, 90 Ill. 612; *Gregory v. Com.*, 121 Pa. 611, 6 A. S. R. 804.

the opposite party, and, in the absence of evidence to the contrary, requires a finding in his favor as to the assumed fact.<sup>34</sup> They do not rest on legal rules of equivalence; they are mere inferences, and whether or not they shall be indulged is a question for the jury alone. Nor do conclusive presumptions have any effect on the burden of adducing evidence. They are indirect expressions of rules of substantive law establishing the legal insignificance of the nonexistence of the fact assumed to exist. Evidence is not admissible to disprove that fact, and if, by any chance, it is adduced, or the nonexistence of the fact is admitted, it has no effect. The rights of the parties are the same, whether the fact exists or not.<sup>35</sup>

Evidential presumptions relate to the burden of proof only in that sense of the term which casts on a party the necessity of adducing evidence to dispel a *prima facie* case. They do not fix the burden of proof, in its proper sense, as meaning the burden of convincing the jury, on a consideration of the entire body of the evidence, of the existence of the facts on which the right of action or defense depends.<sup>36</sup>

(d) **Mode of establishing facts founding presumption.** The facts founding an evidential presumption may become known to the court in due course of proceeding<sup>37</sup> in either of three

<sup>34</sup> See §§ 3(a), 4(a), 12, 14, *supra*.

<sup>35</sup> See § 13(a), *supra*.

<sup>36</sup> Thayer, *Prel. Treat. Ev.* 384; *Mexican Cent. R. Co. v. Lauricella*, 37 Tex. 277, 47 A. S. R. 103. See, however, *Graves v. Colwell*, 90 Ill. 612.

<sup>37</sup> Under abnormal circumstances, these facts may become known to the court also by pleading. It is an established rule that a pleading should aver not evidentiary, but ultimate, facts. *Gulick v. Loder*, 13 N. J. Law, 68, 23 A. D. 711. If this rule is observed, it follows that, if the ultimate facts so stated are denied by the adversary, no presumption of their existence can arise on the pleadings, for the reason that no evidentiary facts are set forth on which a presumption might be based; and if the ultimate facts so stated are admitted by

ways, namely, by judicial notice, by admission, or by evidence. Ordinarily, the evidentiary facts are established by evidence. They may, however, be admitted in the trial, or be recognized by the court without evidence if they are a proper subject of judicial notice. In either case the result is the same. Being aware of the facts, either through evidence, admission, or judicial notice, the court must indulge any presumption that the facts justify.

In the absence of admission or judicial notice, the facts essential to give rise to a presumption must be established by evidence. A presumption cannot rest on a presumption. This is especially true of the so-called presumption of fact.<sup>38</sup>

the adversary, then of course there is no occasion for any presumption of their existence. Assume now, on the other hand, that this rule of pleading is not observed, and that, instead of pleading the ultimate fact, facts evidential of it are set forth. If the adversary, waiving the violation of the rule, denies the facts so alleged, no presumption can be based on them until evidence of their existence is adduced. This being done, a presumption may arise, which, however, is based, not upon the facts pleaded, but upon the evidence of those facts. Finally, assuming that the adversary, waiving the violation of the rule of pleading, admits the evidentiary facts set forth, then, it seems, the existence of the unpleaded ultimate fact might be presumed, and this presumption would be based upon the pleadings. A presumption from the pleadings would not thus arise, it will be observed, in the due course of proceeding. To bring it into existence, there must first be a violation of a rule of pleading and a waiver thereof.

<sup>38</sup> U. S. v. Ross, 92 U. S. 281, 284; *Manning v. J. Hancock Mut. L. Ins. Co.*, 100 U. S. 693; *U. S. v. Carr*, 132 U. S. 644, 653; *Simpson v. State*, 56 Ark. 8, 17; *Pennington's Ex'rs v. Yell*, 11 Ark. 212, 52 A. D. 262; *Globe Acc. Ins. Co. v. Gerisch*, 163 Ill. 625, 54 A. S. R. 486; *Ellis v. Ellis*, 58 Iowa, 720; *Yarnell v. Kan. City, Ft. S. & M. R. Co.*, 113 Mo. 570, 580, 18 L. R. A. 599, 602; *Phila. City Pass. R. Co. v. Henrice*, 92 Pa. 431, 37 A. R. 699; *McAleer v. McMurray*, 58 Pa. 126; *Douglass v. Mitchell's Ex'r*, 35 Pa. 440; *Mo. Pac. R. Co. v. Porter*, 73 Tex. 304; *Doolittle v. Holton*, 26 Vt. 588; *Richmond v. Aiken*, 25 Vt. 324. See *Terry v. Rodahan*, 79 Ga. 278, 11 A. S. R. 420, 431. It has been held,

**§ 17. Nonevidential presumptions.**

(a) **Nature.** The distinction between evidential and nonevidential presumptions lies both in their origin and in their immediate operation and effect.<sup>39</sup> Evidential presumptions are a development of circumstantial evidence, and their immediate consequence is to fix the equivalence of a group of evidentiary facts with an unknown ultimate fact. Nonevidential presumptions, on the other hand, are not an outgrowth of evidence, nor do they define the probative effect of evidentiary facts. They are rules of positive law stated in the form of presumptions. They may relate to the substantive law or to the law of procedure. In either case they have nothing to do with evidence, and are always convertible into rules of positive law.<sup>40</sup> Being such in reality, they rest on the same basis. They are immediately founded on the same considerations of justice, policy, and expediency as give rise to their correlative rules of positive law.

It has been denied that nonevidential presumptions are true presumptions, but this seems doubtful. Presumption is merely a mental process,—the taking of a fact for granted. If, therefore, the court, in arriving at a decision, adopts this process, how can it be said that in that case the presumption does not exist? The process of presumption may have been an unnecessary one, either because, as in the case of conclusive presumptions, the existence of the assumed fact is legally insignificant and of no effect on the rights of the parties, or because,

however, that a fact in the nature of an inference drawn from facts in evidence may itself be taken as the basis of a new inference. *Hinshaw v. State*, 147 Ind. 334; 7 Current Law, 1515.

<sup>39</sup> Sections 15, 16, *supra*.

<sup>40</sup> The presumption that a minor is not emancipated, for example, means simply that the party alleging emancipation must prove it. *Lisbon v. Lyman*, 49 N. H. 553, 563.

without indulging any presumption, established rules of positive law would otherwise lead to the same conclusion as that at which the court arrived by assuming the fact to exist. But these considerations seem to affect the propriety of the presumption, rather than its existence; and while it is true that these presumptions, as such, are generally unnecessary and useless,<sup>41</sup> and may be regarded as mere figures of speech,<sup>42</sup> yet, as presumptions, they do in fact exist.

Many nonevidential presumptions are associated in the minds of the profession with the law of evidence, and their effect will be considered in these pages. On the other hand, many are not. Presumptions indulged in construing special verdicts,<sup>43</sup> and in proceedings on appeal and in error,<sup>44</sup> for instance, are seldom linked with evidence, and they may therefore be excluded from the present discussion. For the like reason, no consideration need be given those presumptions which are usually considered as belonging, as in truth they do belong, to various topics of substantive law and procedure, such as those relating to the validity, meaning, and effect of statutes<sup>45</sup> and ordinances,<sup>46</sup> pleadings,<sup>47</sup> contracts<sup>48</sup> and other writings,<sup>49</sup> and private conduct.<sup>50</sup>

<sup>41</sup> *State v. Pike*, 49 N. H. 399, 6 A. R. 533, 587.

<sup>42</sup> See *Blackburn v. Vigors*, 17 Q. B. Div. 553, 556; *State v. Pike*, 49 N. H. 399, 6 A. R. 533, 543.

<sup>43</sup> *Lawrence v. Beaubien*, 2 Bailey (S. C.) 623, 23 A. D. 155. See Thayer, *Prel. Treat. Ev.* 331.

<sup>44</sup> *Adams v. Main*, 3 Ind. App. 232, 50 A. S. R. 266; *Boslow v. Shenberg*, 52 Neb. 164, 66 A. S. R. 487; *Searls v. Knapp*, 5 S. D. 325, 49 A. S. R. 873; *State v. Kessler*, 15 Utah, 142, 62 A. S. R. 911; *Jarvis v. N. W. Mut. Relief Ass'n*, 102 Wis. 546, 72 A. S. R. 895.

<sup>45</sup> *In re Garcelon's Estate*, 104 Cal. 570, 43 A. S. R. 134; *People v. Briggs*, 50 N. Y. 553; *State v. Moore*, 104 N. C. 714, 17 A. S. R. 696; *Mauldin v. City Council*, 42 S. C. 293, 46 A. S. R. 723; *Chamberlain v. Wood*, 15 S. D. 216, 91 A. S. R. 674.

<sup>46</sup> *Twilley v. Perkins*, 77 Md. 252, 39 A. S. R. 408; *Littlefield v. State*,

(b) **Effect.** Many nonevidential presumptions affect, in a sense, the burden of proof in one or the other of the two meanings of that term.

— **Effect on burden of going forward with trial by adducing evidence of nonexistence of assumed fact.** Nonevidential presumptions may be regarded as making a *prima facie* case as to the fact assumed, and thus casting on the opposite party the burden of adducing evidence to the contrary.<sup>51</sup> They do this, not by virtue of a rule of law making certain facts of which evidence has been adduced the equivalent of the fact assumed, as is the case with evidential presumptions, but by virtue of their influence as rules of positive law on trial procedure.<sup>52</sup> Their effect in this respect is, however, the same with evidential presumptions. They stand for proof of the fact assumed, but only until contradicted. When evidence in rebuttal is adduced, the presumption is dispelled, the *prima facie* case disappears, and all the evidence as to the fact for-

42 Neb. 223, 47 A. S. R. 697; *Ex parte Wygant*, 39 Or. 429, 87 A. S. R. 673.

<sup>47</sup> *Brighton v. White*, 128 Ind. 320; *Louisville v. Hyatt*, 2 B. Mon. (Ky.) 177, 36 A. D. 594; *State v. Dale*, 141 Mo. 284, 64 A. S. R. 513; *W. U. Tel. Co. v. Robinson*, 97 Tenn. 638, 34 L. R. A. 431; *State v. Kempf*, 69 Wis. 470, 2 A. S. R. 753.

<sup>48</sup> *Anderson v. Morice*, L. R. 10 C. P. 609; *Richelieu Hotel Co. v. International M. E. Co.*, 140 Ill. 248, 33 A. S. R. 234; *Kernochan v. Murray*, 111 N. Y. 306, 7 A. S. R. 744; *Bowman v. First Nat. Bank*, 9 Wash. 614, 43 A. S. R. 870.

<sup>49</sup> *Culver v. Marks*, 122 Ind. 554, 17 A. S. R. 377.

<sup>50</sup> *Davis v. Fish*, 1 G. Greene (Iowa) 406, 48 A. D. 387; *Home F. Ins. Co. v. Barber* (Neb.) 60 L. R. A. 927.

<sup>51</sup> *Sturdevant's Appeal*, 71 Conn. 392, *Thayer, Cas. Ev.* 95, 96; *In re Barber's Estate*, 63 Conn. 393, 22 L. R. A. 90, 95; *Brighton v. White*, 128 Ind. 320; *Market & F. Nat. Bank v. Sargent*, 85 Me. 349, 35 A. S. R. 376; *State v. Pike*, 49 N. H. 399, 6 A. R. 533, 544; *Wood v. Morehouse*, 45 N. Y. 368; *Weiss v. Pa. R. Co.*, 79 Pa. 387.

<sup>52</sup> *Sturdevant's Appeal*, 71 Conn. 392, *Thayer, Cas. Ev.* 95, 96; *Lisbon v. Lyman*, 49 N. H. 553, 563.



merly assumed is to be considered as a whole, and the jury are to find according to the truth.<sup>53</sup>

— **Effect on burden of convincing jury of nonexistence of assumed fact.** Nonevidential presumptions, unlike evidential presumptions, may be regarded as determining on whom the burden of proof rests, in that sense of the term which requires a party to convince the jury of the existence of the facts on which his case depends.<sup>54</sup> They do this, however, not because they are presumptions, but because they are positive rules of law affecting substantive rights or pleading.<sup>55</sup> Thus, it is only a rule of natural justice that no one shall be punished as for crime until he is proven guilty. This rule does not depend on any presumption of innocence; rather, the presumption depends upon the rule. To say that a man is presumed innocent is only converting the positive rule into the indirect form of a presumption.

Being in reality positive rules of law, nonevidential presumptions have the same effect as have those rules. In so far, therefore, as they affect the burden of proof in the sense of burden of convincing the jury of the facts essential to the cause of action or defense, they continue throughout the trial and until the verdict is found. By adducing evidence in rebuttal, the party against whom they operate does not thereupon dispel them, as in those cases where the presumption, whether evidential or nonevidential, makes a *prima facie* case which requires the opposing party to go forward with the trial by adducing evidence in rebuttal. They do not there-

<sup>53</sup> *Phila., W. & B. R. Co. v. Stebbing*, 62 Md. 504, 518; *McGinnis v. Kempsey*, 27 Mich. 363; *Wilson v. Hayes*, 40 Minn. 531, 12 A. S. R. 754; *Rapp v. St. J. & I. R. Co.*, 106 Mo. 423; *Morton v. Heidorn*, 135 Mo. 608, 617; *Owens v. R. & D. R. Co.*, 88 N. C. 502, 511, 512. See, however, *In re Barber's Estate*, 63 Conn. 393, 22 L. R. A. 90.

<sup>54</sup> *McMillan v. School Committee*, 107 N. C. 609, 10 L. R. A. 823.

<sup>55</sup> See *Thayer*, *Prel. Treat. Ev.* 384.

upon become *functus officio*, because their office in this connection is not to make a *prima facie* case, but to say who must bear the burden, upon all the evidence, of convincing the jury of the existence of a state of facts contrary to that which they assume to exist. When this opposing state of facts is thus established in the minds of the jury, and not until then, this burden and its correlative presumption are discharged and disappear. Thus, it is a rule of positive law that the state must prove the guilt of a man prosecuted for crime. This burden rests on the state throughout the trial. It does not shift when the state makes a *prima facie* case of guilt. A *prima facie* case casts on the accused the necessity of going forward with the trial by adducing evidence to the contrary, but it does not affect the burden of establishing guilt. This burden is not discharged until the jury, upon considering the entire body of evidence adduced in the trial, are convinced of the accused's guilt. The presumption of innocence being merely an indirect statement of this rule as to the burden of proof, it operates in the same way. It does not disappear when the state adduces evidence of guilt. It has not served its purpose until the jury have become convinced of guilt. Again, if a man seeks to avoid a contract on the ground that he was insane when he entered into it, he must convince the jury of that fact. This is a rule of positive law. Stating it indirectly, we have an application of the presumption of sanity. Now, when this party adduces evidence of insanity, the presumption does not vanish,—the burden of proving insanity still remains upon him; and this burden and its correlative presumption are not discharged and overcome until the jury are convinced that he was insane.

#### D. CONFLICT OF PRESUMPTIONS.

§ 18. Several presumptions may arise in the same case, and of these all may be in favor of one party, or some may

be in his favor and some against him. So long as the facts thus assumed are consistent with each other, it is obvious that the several presumptions do not come into conflict, even though one presumption favors one party and the other favors his adversary. If, however, two presumptions relate to the same fact, or to some essential element of it, and one assumes that fact to exist, and the other assumes it or some element of it not to exist, the presumptions are said to come into conflict. This conflict, however, is only apparent, as an inquiry into the nature and effect of the presumptions will show.<sup>56</sup> The key to the situation is found in the relation of the presumptions to the burden of proof; and in this connection it is important to keep in mind the distinction between the two meanings of that term, and also, incidentally, the distinction between evidential and nonevidential presumptions.

This discussion is not concerned with so-called presumptions of fact, which, as has been seen,<sup>57</sup> are nothing but inferences from circumstantial evidence. It is quite obvious that these come into conflict in any case wherein that sort of evidence is adduced by both parties with reference to the same ultimate fact,<sup>58</sup> and, in this event, that inference will naturally be indulged which has the greatest degree of probability to sustain it. This, however, is a case of conflicting inferences, not conflicting presumptions, and the matter is therefore beyond the scope of the present inquiry.

<sup>56</sup> Thayer, *Prel. Treat. Ev.* 341, 343; Wigmore, *Greenl. Ev.* p. 108.

<sup>57</sup> Section 12, *supra*.

<sup>58</sup> Where, for instance, a sheriff's sale is attacked for want of due advertisement, none appearing in the officer's return, the argument that everything that was done appears in the return because the officer is required by law to return the writ with his doings thereon comes into conflict with the argument that the officer did not sell before advertising because the statute makes it his duty to advertise before selling. *Foster v. Berry*, 14 R. I. 601.

**§ 19. Presumptions relating to burden of convincing jury.**

Nonevidential presumptions, as has been seen,<sup>59</sup> are always convertible into rules of positive law. Some of these relate to the burden of proof; others do not. Conclusive presumptions, for instance, are rules of substantive law declaring the legal insignificance or immateriality of the nonexistence of the fact assumed. They do not say that the party against whom they operate must bear the burden of establishing the nonexistence of that fact. On the contrary, they say that the nonexistence of that fact has no legal bearing on the case, and that the rights of the parties are the same whether or not the fact exists.<sup>60</sup> Between these presumptions, therefore, there is no semblance of conflict, and they may be dismissed from notice.

Some nonevidential presumptions, however, may be said to affect the burden of proof, and, unlike evidential presumptions, they may affect it in that sense of the term which places on a party the necessity of convincing the jury of the existence of the facts essential to his case. They do this, however, not as presumptions, but by virtue of the fact that, in reality, they are rules of positive law relating to the matter in question.<sup>61</sup> Consequently there is no more conflict between these presumptions, in a given case, than there is in the rules of positive law of which they are the indirect expressions.

**§ 20. Presumptions relating to burden of adducing evidence.**

A *prima facie* case casting on the opposing party the burden of adducing evidence in rebuttal may consist in either evidential or nonevidential presumptions.

Evidential presumptions do not come into conflict. Their nature precludes it. The introduction of evidence which

<sup>59</sup> Section 17, *supra*.

<sup>60</sup> Section 13(a), *supra*.

<sup>61</sup> Section 17(b), *supra*.

tends to disprove the assumed fact dispels the presumption, and the question of the existence of the fact becomes a matter of inference for the jury upon all the evidence.<sup>62</sup> If the plaintiff adduces evidentiary facts which give rise to a presumption of the ultimate fact, and the defendant does not dispute the evidentiary facts, the burden is on the defendant to adduce evidence tending to establish additional facts, and thereby render the presumption inapplicable and of no force. These additional facts, it is to be observed, may be such as not only to dispel the presumption in favor of plaintiff, but also to give rise to a new and different presumption in favor of defendant. In this event the burden of adducing evidence is shifted to plaintiff, and he must adduce evidence that tends to defeat this new presumption, the same as defendant was required to do in the first instance; and if the plaintiff adduces evidence of additional facts, the presumption in favor of defendant is dispelled, the same as was the original presumption in favor of plaintiff. In such cases as these the presumptions do not come into conflict, since the additional evidence which gives rise to the later presumption dispels the earlier. It is a case of "successive" presumptions, and not a case of "conflicting" presumptions.<sup>63</sup> What is meant, therefore, by conflicting presumptions, so far as it refers to evidential presumptions, is conflicting inferences.

The same is true of nonevidential presumptions in their effect as creating a *prima facie* case casting on the adverse party the necessity of going forward with the trial by adducing evidence to the contrary. When evidence in rebuttal is given, the presumption has served its purpose and disappears, and the existence of the fact formerly assumed becomes a question of inference for the jury upon all the evidence.<sup>64</sup>

<sup>62</sup> Section 16(c), *supra*.

<sup>63</sup> Wigmore, Greenl. Ev. § 14y(3).

**§ 21. Conflict between presumptions relating to burden of convincing jury and those relating to burden of adducing evidence.**

In some cases a nonevidential presumption, operating as a rule of positive law, fixes the burden of establishing or convincing on one party, and another presumption, whether evidential or nonevidential, creates a *prima facie* case in his favor as to some essential fact negatived by the first presumption. These presumptions do not, in truth, come into conflict, however, since their operation is different. The first places on the party the burden, not of going forward with the trial, but of convincing the jury of the existence of the facts essential to his case. The second does not affect this burden. It simply relieves him of the necessity of adducing evidence of the fact which it assumes to exist, and casts on the other party the burden of adducing evidence of its nonexistence. When this rebutting evidence is adduced, the second presumption disappears, and the existence of the fact in question is to be determined by the jury upon all the evidence introduced in the trial. The first presumption continues, however, operating still as a rule of positive law which requires him to convince the jury of the facts essential to his case. In such cases as these, therefore, the two presumptions operate without friction, each serving a different purpose. Thus, in a trial for crime, the presumption of innocence, operating as a rule of positive law, requires the state to establish guilt, and incidentally the state is bound to begin the trial by adducing evidence of guilt. When an act otherwise criminal is shown, a presumption of sanity, operating as a rule of trial procedure, requires the accused to go forward by adducing evidence of insanity, if he relies on it as a defense. When he does so,

<sup>64</sup> Section 17(b), *supra*.

the presumption of sanity, having served its purpose, disappears, and all the evidence in the case is to be considered by the jury in determining the fact of sanity. If the jury entertain a reasonable doubt of its existence, they must acquit, because it is an essential element of the state's case, and the burden of establishing guilt as fixed by the presumption of innocence rests on the state until the verdict is found. So, in the trial of a public officer for embezzlement, the presumption of innocence requires the state to convince the jury of the accused's guilt. When public accounts showing a shortage have been introduced, the presumption of their correctness makes a *prima facie* case in favor of the state, and imposes on the accused the burden of adducing evidence of their incorrectness. If he adduces such evidence, the presumption disappears, and the correctness of the accounts is to be determined by the jury upon all the evidence, without regard to any presumption. The burden of convincing the jury of guilt as fixed by the presumption of innocence still rests on the state, however, as it does from beginning to end.<sup>65</sup> Again, in prosecutions for certain crimes, such as seduction, and sometimes abduction and defamation, the chastity of the prosecutrix is an essential element of the state's case. The presumption of innocence, operating in favor of the accused, therefore requires the state to convince the jury of the existence of this fact. By the better opinion, however, a presumption of chastity operates to make a *prima facie* case on this point in favor of the state, thus relieving it, for the time being, of the necessity of adducing evidence of chastity, and requiring the accused to adduce evidence of unchastity.<sup>66</sup> When this evidence

<sup>65</sup> *Hemingway v. State*, 68 Miss. 371.

<sup>66</sup> *Slocum v. People*, 90 Ill. 274 (abduction); *State v. Wells*, 48 Iowa, 671 (seduction). *Contra*, *McArthur v. State*, 59 Ark. 431 (slander); *State v. McDaniel*, 84 N. C. 803 (slander); *West v. State*, 1 Wis. 209 (seduction).

in rebuttal is adduced, the presumption disappears, and the question of chastity is to be determined by the jury upon all the evidence, without regard to the presumption. The presumption of innocence still operates, however, to require the state to convince the jury of all the facts essential to the crime, including the fact of chastity.

Of the two presumptions thus operating in each of the several illustrations just given, one always fixes the burden of convincing the jury of the facts essential to a conviction. The other fixes the necessity of going forward with the trial by adducing evidence to dispel a *prima facie* case. One does not, the other does, make a *prima facie* case. One does not, the other does, disappear when evidence to the contrary is introduced. They therefore serve different purposes, and do not come into conflict.

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## A. PRELIMINARY CONSIDERATIONS.

§ 22. As has been noticed at various points in the preceding discussion, much confusion exists in the terminology of the law of burden of proof and presumptions.<sup>1</sup> Many cases substantially in accord will therefore be found to be in apparent conflict. This consideration leads to the cautionary observation that in the following pages an attempt has been made to cite the cases according to the effect which they give to the various conceptions under discussion, rather than according to the terms which they use to denote those conceptions. In other words, where the two are inconsistent, the cases are cited according to the decision, rather than according to the terms used in the discussion leading up to the decision.

<sup>1</sup> Distinction between meanings of burden of proof, see § 2, *supra*. Distinction between case for jury and *prima facie* case, see §§ 3, 4, *supra*. Distinction between presumptions of fact and of law, see §§ 12-14, *supra*. Distinction between disputable and conclusive presumptions, see § 13, *supra*. Distinction between rebutting presumption and disproving facts on which it is founded, see § 13(a), *supra*. Improper application of term "presumption of fact" to disputable presumptions as a class, see § 12, *supra*. Improper application of term "presumption of fact" to presumptions of law, see § 12, *supra*.

## B. AUTHORITY AND REGULARITY.

§ 23. It is a maxim of the law that all things are presumed to have been rightly and regularly done;<sup>2</sup> and this presumption is extended in some instances so as to assume the performance of official duties, and it is applied to acts of individuals, as well as to the duties of officers. Want of authority and irregularity are to be distinguished in this connection from illegality and fraud, presumptions as to which are elsewhere considered.<sup>3</sup>

## § 24. Appointment, qualification, and authority.

If a person acts openly in an official or quasi official capacity, the presumption is that he has been duly appointed, so that one who impeaches his acts for want of authority has the burden of adducing evidence of his lack of power.<sup>4</sup> The presumption

<sup>2</sup> Thayer, Prel. Treat. Ev. 335; U. S. Bank v. Dandridge, 12 Wheat. (U. S.) 64, 70. This presumption is expressed in the maxim, *Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*.

<sup>3</sup> See §§ 55-58, *infra*, as to legality, and § 43, *infra*, as to fraud.

<sup>4</sup> Marshall v. Lamb, 5 Q. B. 115; Plumer v. Brisco, 11 Q. B. 46; Ronkendorff v. Taylor's Lessee, 4 Pet. (U. S.) 349; Shelbyville Trustees v. S. & E. Turnpike Co., 1 Metc. (Ky.) 54; New Portland v. Kingfield, 55 Me. 172; Kobs v. Minneapolis, 22 Minn. 159; Dolph v. Barney, 5 Or. 191.

*Administrator.* Battles v. Holley, 6 Me. 145.

*Attorneys at law*, see pages 83, 99, *infra*.

*Commissioner to take affidavits.* Rex v. Howard, 1 Moody & R. 187; Reg. v. Newton, 1 Car. & K. 469.

*Constable.* Butler v. Ford, 1 Cromp. & M. 662; Webber v. Davis, 5 Allen (Mass.) 393.

*Corporate officers*, see § 28(b), *infra*.

*Justices of the peace.* Bullen v. Arnold, 31 Me. 583; Forsaith v. Clark, 21 N. H. 409; Wilcox v. Smith, 5 Wend. (N. Y.) 231, 21 A. D. 213, 216.

*Tax collector.* Jacob v. U. S., 1 Brock. 520, Fed. Cas. No. 7,157; Johnston v. Wilson, 2 N. H. 202, 9 A. D. 50.

This presumption is applied to all sorts of officers,—municipal, state,

obtains in criminal proceedings,<sup>5</sup> as well as in civil cases, as, for instance, in a trial for assaulting a police officer,—the officer's appointment is evidenced, *prima facie*, by his having acted in that capacity.<sup>6</sup>

The presumption arises even where the title of the officer is directly put in issue in an action wherein he is a party.<sup>7</sup> In *quo warranto* proceedings, however, the burden of proof is not

and national,—though there would seem to be no need of applying it to public officers of whose appointment the court is required to take judicial notice. See §§ 97, 98, *infra*, as to judicial notice.

To aid in founding the presumption, it may be shown that the person in question exercised the office, not only before, but also for a reasonable time after, he performed the official act in question. *Doe d. Hopley v. Young*, 8 Q. B. 63.

This question of the necessity of offering evidence of the appointment of a *de jure* officer is to be distinguished from the question whether the acts of a *de facto* officer are valid. The latter question is one of substantive law, with which a work on evidence is not concerned.

The qualification of the following officers may be presumed:

*Administrator.* *Tucker v. Harris*, 13 Ga. 1, 58 A. D. 488; *Battles v. Holley*, 6 Me. 145.

*Alderman.* *Rex v. Hawkins*, 10 East, 211.

*Judge.* *Price v. Springfield R. E. Ass'n*, 101 Mo. 107, 20 A. S. R. 595.

*Marshal.* *Killpatrick v. Frost*, 2 Grant Cas. (Pa.) 168.

Competency of an officer to perform his duties may be presumed, in the absence of evidence to the contrary. *State v. Main*, 69 Conn. 123, 61 A. S. R. 30; *Ashe v. Lanham*, 5 Ind. 434.

The presumption is that a person acting as an officer has taken the proper oath. *Nelson v. People*, 23 N. Y. 293.

*Foreign officers.* These presumptions apply to foreign officers. *Sumner v. Mitchell*, 29 Fla. 179, 30 A. S. R. 106; *Conolly v. Riley*, 25 Md. 402; *Forsaith v. Clark*, 21 N. H. 409; *Den d. Saltar v. Applegate*, 23 N. J. Law, 115; *Spaulding v. Vincent*, 24 Vt. 501; *Ritchie v. Carpenter*, 2 Wash. 512, 26 A. S. R. 877.

<sup>5</sup> *Rex v. Verelst*, 3 Camp. 432; *State v. Findley*, 101 Mo. 217.

<sup>6</sup> *Com. v. Kane*, 108 Mass. 423, 11 A. R. 373; *Com. v. McCue*, 16 Gray (Mass.) 226; *State v. Roberts*, 52 N. H. 492. And see *Rex v. Gordon*, 1 Leach, 515.

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on the relator, nor on the state, but on the respondent. Unless, therefore, he can prove title to the office, he will be ousted.<sup>8</sup> If, however, the relator asserts title to the office in himself, the burden of proof rests on him to make his claim good, if he would obtain a judgment for possession of the office.<sup>9</sup>

<sup>7</sup> *Cannell v. Curtis*, 2 Bing. N. C. 228; *Bunbury v. Matthews*, 1 Car. & K. 380; *Berryman v. Wise*, 4 Term R. 366; *Hutchings v. Van Bokkelen*, 34 Me. 126.

One who has been duly elected and inducted into an office need not show that he is eligible, where his right to the office is subsequently disputed because of his failure to file an additional bond. *Knox County Com'rs v. Johnson*, 124 Ind. 145, 19 A. S. R. 88.

<sup>8</sup> *Rex v. Leigh*, 4 Burrow, 2143; *People v. Ridgley*, 21 Ill. 65, 67; *Tillman v. Otter*, 93 Ky. 600, 29 L. R. A. 110, 111 (semble); *People v. Mayworm*, 5 Mich. 146; *People v. Thacher*, 55 N. Y. 525, 14 A. R. 312; *State v. Norton*, 46 Wis. 332, 342; *People v. Stratton*, 33 Colo. 88.

It has been held that this rule does not apply to corporate officers, so that the burden of proof does not rest on the respondent. *State v. Kupferle*, 44 Mo. 154, 100 A. D. 265; *State v. Hunton*, 28 Vt. 594. *Contra*, *State v. Harris*, 3 Ark. 570, 36 A. D. 460.

The respondent makes a prima facie case of title by showing a certificate of election; but if the relator shows the returns to be false, the certificate is of no effect, and the respondent must prove his title otherwise. *People v. Thacher*, 55 N. Y. 525, 14 A. R. 312; *People v. Lacoste*, 37 N. Y. 192; *State v. Norton*, 46 Wis. 332, 342. If the respondent shows an election by persons acting as electors under color of right, he makes a prima facie case, and the burden of showing that the electors were not qualified rests on the state. *State v. Harris*, 3 Ark. 570, 36 A. D. 460. Presumption of correctness of election returns, see page 96, *infra*.

<sup>9</sup> *Miller v. English*, 27 N. J. Law, 317; *People v. Thacher*, 55 N. Y. 525, 14 A. R. 312; *People v. Lacoste*, 37 N. Y. 192; *State v. Norton*, 46 Wis. 332, 344. And see *Tillman v. Otter*, 93 Ky. 600, 29 L. R. A. 110.

The same is true of a relator in mandamus proceedings who asserts title to an office. *State v. Williams*, 99 Mo. 291; *People v. Nostrand*, 46 N. Y. 375.

The failure of the relator to discharge the burden of proof thus resting on him has no other effect than to defeat an affirmative judgment in his favor. It does not prevent a judgment of ouster against the

Ordinarily, a party who seeks to charge another as principal for the acts of an agent has the burden of proving the agency.<sup>10</sup> This rule does not apply after long possession under a deed executed in the name of the titular owner by an agent. It is then presumed that the agent had authority to make the deed.<sup>11</sup> Nor does the rule apply to an attorney at law. It is presumed that he has authority to appear for the party in whose name he enters an appearance or conducts the action or defense.<sup>12</sup> This presumption is rebuttable.<sup>13</sup>

As against the person who has assumed to act as agent, a presumption may arise in favor of third persons that he had authority to do the acts which he has done in that capacity;<sup>14</sup>

respondent, if the latter fails to show title to the office. *Clark v. People*, 15 Ill. 213; *People v. Thacher*, 55 N. Y. 525, 14 A. R. 312; *People v. Phillips*, 1 Denio (N. Y.) 388; *State v. Norton*, 46 Wis. 332, 344.

<sup>10</sup> *Pole v. Leask*, 33 Law J. Ch. 155; *Sellers v. Commercial F. Ins. Co.*, 105 Ala. 282; *Harris v. San Diego Flume Co.*, 87 Cal. 526; *Davies v. Eastern Steamboat Co.*, 94 Me. 379, 53 L. R. A. 239; *Whitaker v. Ballard*, 178 Mass. 584; *B. & O. E. Relief Ass'n v. Post*, 122 Pa. 579, 9 A. S. R. 147; 1 *Clark & S. Agency*, 163.

<sup>11</sup> *Jarboe v. McAtee's Heirs*, 7 B. Mon. (Ky.) 279, 281; *Buhols v. Boudousquie*, 6 Mart. N. S. (La.) 153; *Stockbridge v. West Stockbridge*, 14 Mass. 257 (semble); *Thompson v. Carr*, 5 N. H. 510. See *College of St. Mary Magdalen v. Attorney General*, 3 Jur. N. S. (pt. 1) 675.

<sup>12</sup> *Platt's Heirs v. McCullough's Heirs*, 1 McLean, 69, Fed. Cas. No. 11,113; *Tally v. Reynolds*, 1 Ark. 99, 31 A. D. 737; *Williams v. Uncompahgre Canal Co.*, 13 Colo. 469; *Postal Tel. Cable Co. v. L., N. O. & T. R. Co.*, 43 La. Ann. 522; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 A. D. 656; *Finneran v. Leonard*, 7 Allen (Mass.) 54, 83 A. D. 665; *Vorce v. Page*, 28 Neb. 294; *Holder v. State*, 35 Tex. Cr. App. 19. And see *Beem v. Kimberly*, 72 Wis. 343; 2 *Clark & S. Agency*, 1380. See, also, page 99, *infra*.

<sup>13</sup> *Tally v. Reynolds*, 1 Ark. 99, 31 A. D. 737; *Harshey v. Blackmarr*, 20 Iowa, 161, 89 A. D. 520; *Newcomb v. Dewey*, 27 Iowa, 381; *McAlexander v. Wright*, 3 T. B. Mon. (Ky.) 189, 16 A. D. 93; *Marvel v. Manouvrier*, 14 La. Ann. 3, 74 A. D. 424; *Boro v. Harris*, 13 Lea (Tenn.) 36; 2 *Clark & S. Agency*, 1333.

<sup>14</sup> *Montgomery v. Pac. Coast Land Bureau*, 94 Cal. 284, 28 A. S. R. 122.



and, agency being established, the agent is presumed to have the authority ordinarily granted to agents of his class,<sup>15</sup> and the agency is presumed to be general, not limited.<sup>16</sup>

### § 25. Course of business.

The performance of particular acts may be presumed from the known course of business, public or private.

#### (a) Public business—Delivery of letters and telegrams.

The important illustration of this in public affairs is the presumption that a letter, properly addressed, stamped, and mailed, was duly delivered to the addressee in due course of mail.<sup>17</sup> To raise the presumption, it must appear that the let-

<sup>15</sup> *Austrian v. Springer*, 94 Mich. 343, 34 A. S. R. 350; *Thomas v. City Nat. Bank*, 40 Neb. 501, 24 L. R. A. 263; *Campbell v. Mfrs. Nat. Bank*, 67 N. J. Law, 301, 91 A. S. R. 438; *Nichols v. Or. S. L. R. Co.*, 24 Utah, 83, 91 A. S. R. 778.

<sup>16</sup> *Austrian v. Springer*, 94 Mich. 343, 34 A. S. R. 350.

<sup>17</sup> *Rosenthal v. Walker*, 111 U. S. 185; *De Jarnette v. McDaniel*, 93 Ala. 215; *Breed v. First Nat. Bank*, 6 Colo. 235; *Garland v. Gaines*, 73 Conn. 662, 84 A. S. R. 182; *Augusta v. Vienna*, 21 Me. 298; *Chase v. Surry*, 88 Me. 468, 475; *Huntley v. Whittier*, 105 Mass. 391, 7 A. R. 536; *McDowell v. Aetna Ins. Co.*, 164 Mass. 444, 446; *Briggs v. Hervey*, 130 Mass. 186; *Marston v. Bigelow*, 150 Mass. 45, 5 L. R. A. 43; *Oregon S. S. Co. v. Otis*, 100 N. Y. 446, 53 A. R. 221; *Folsom v. Cook*, 115 Pa. 539; *Callan v. Gaylord*, 3 Watts (Pa.) 321; *McDermott v. Jackson*, 97 Wis. 64.

*Letter inclosing money.* *Olney v. Blossier*, 12 N. Y. State Rep. 211; *Russell v. Buckley*, 4 R. I. 525, 70 A. D. 167.

*Notices required by insurance policy.* *Pitts v. Hartford L. & A. Ins. Co.*, 66 Conn. 376, 50 A. S. R. 96; *Home Ins. Co. v. Marple*, 1 Ind. App. 411; *Pennypacker v. Capital Ins. Co.*, 80 Iowa, 56, 20 A. S. R. 395; *Dade v. Aetna Ins. Co.*, 54 Minn. 336; *Plath v. Minn. F. M. F. Ins. Ass'n*, 23 Minn. 479, 23 A. R. 697; *Nat. Masonic Acc. Ass'n v. Burr*, 57 Neb. 437.

*Notices of nonpayment and protest.* *Stocken v. Collin*, 7 Mees. & W. 515; *Saunderson v. Judge*, 2 H. Bl. 509; *Bussard v. Levering*, 6 Wheat. (U. S.) 102; *Loud v. Merrill*, 45 Me. 516; *Shoemaker v. Mechanics' Bank*, 59 Pa. 79, 98 A. D. 315; *Jensen v. McCorkell*, 154 Pa. 323, 35 A. S. R. 843. See note 23, *infra*.

ter was properly addressed,<sup>18</sup> that the postage was prepaid,<sup>19</sup> and that the letter was duly mailed.<sup>20</sup> The presumption is

*Notice of dissolution of partnership.* Young v. Clapp, 147 Ill. 176; Eckerly v. Alcorn, 62 Miss. 228; Austin v. Holland, 69 N. Y. 571, 25 A. R. 246.

*Notice of assignment for creditors.* Boorum v. Armstrong (Tenn. Ch. App.) 37 S. W. 1095.

*Notice of corporate meeting.* Ashley Wire Co. v. Ill. Steel Co., 164 Ill. 149, 56 A. S. R. 187.

So, if an envelope bears directions for its return to the sender in case it is not called for within a certain time, the inference is that the letter would be returned if not called for. Hedden v. Roberts, 134 Mass. 38.

In some cases, statutory notices cannot be thus proved. Actual notice is necessary. Inhabitants of Groton v. Inhabitants of Lancaster, 16 Mass. 110.

This presumption of delivery does not arise from the mailing of a registered letter, at least where the absence of the receipt required of the addressee by the post-office regulations is not accounted for. First Nat. Bank v. McManigle, 69 Pa. 156, 8 A. R. 236.

<sup>18</sup> Henderson v. Carbondale Coal & Coke Co., 140 U. S. 25; Goodwin v. Provident Sav. L. A. Ass'n, 97 Iowa, 226, 59 A. S. R. 411; Fleming & A. Co. v. Evans, 9 Kan. App. 858; Ward v. Hasbrouck, 44 App. Div. (N. Y.) 32; Phelan v. N. W. L. Ins. Co., 113 N. Y. 147, 10 A. S. R. 441.

The address on the envelope is presumed to correspond with the address in the letter, in the absence of evidence to the contrary. Phelan v. N. W. L. Ins. Co., 113 N. Y. 147, 10 A. S. R. 441.

Even though the addressee has changed his place of address from that to which the letter was directed, yet, if he has notified the post office of the change, the presumption is that he has received the letter. Marston v. Bigelow, 150 Mass. 45, 5 L. R. A. 43.

<sup>19</sup> Bless v. Jenkins, 129 Mo. 647; Ward v. Hasbrouck, 44 App. Div. (N. Y.) 32. See Morton v. Morton, 16 Colo. 358. *Contra*, Augusta v. Vienna, 21 Me. 298 (statute).

It is presumed, in favor of a notice of protest, that the notary, in sending it, prepaid the postage. Brooks v. Day, 11 Iowa, 46.

<sup>20</sup> Allen v. Blunt, 2 Woodb. & M. 121, Fed. Cas. No. 217.

Handing the letter to a mail agent on a train is sufficient mailing. Watson v. Richardson, 110 Iowa, 673.

The place of deposit need not be a place designated as such by the post-office department. If, for instance, the postman is accustomed to

that the letter was received in due course of mail, not that it was received within any particular time from the date of mailing;<sup>21</sup> and the presumption does not arise where postal communication was at the time interrupted, as, for example, by war.<sup>22</sup> The presumption is not conclusive, and evidence is therefore admissible to rebut it; the question of delivery of the letter then being one for the determination of the jury upon all the evidence, regardless of any presumption.<sup>23</sup> If,

take letters for mailing from a private box, and the owner of the box deposited there a properly stamped and addressed envelope, it may be sufficient to raise the presumption. *Skillbeck v. Garbett*, 7 Q. B. 846, 9 Jur. 939.

A presumption that a letter was mailed may arise from usage in a particular office in reference to mailing letters, although there is no direct evidence of the actual mailing of the letter in question. *Lawrence Bank v. Raney & B. Iron Co.*, 77 Md. 321. See, however, *Hetherington v. Kemp*, 4 Camp. 193.

The presumption is, in the absence of evidence to the contrary, that a letter was mailed and sent at the time and place shown by the postmark. *Stocken v. Collin*, 7 Mees. & W. 515; *New Haven County Bank v. Mitchell*, 15 Conn. 206; *Early v. Preston*, 1 Pat. & H. (Va.) 228. And see *Fletcher v. Braddyll*, 3 Starkie, 64. *Contra*, *Shelburne Falls Nat. Bank v. Townsley*, 102 Mass. 177, 3 A. R. 445. However, the date of the contents of the letter raises no presumption that it was mailed at that time, or at all. *Uhlman v. Arnholdt & S. Brew. Co.*, 53 Fed. 485; *Smiths v. Shoemaker*, 17 Wall. (U. S.) 630.

<sup>21</sup> *German Nat. Bank v. Burns*, 12 Colo. 539, 13 A. S. R. 247; *Boon v. State Ins. Co.*, 37 Minn. 426; *Early v. Preston*, 1 Pat. & H. (Va.) 228.

<sup>22</sup> *James v. Wade*, 21 La. Ann. 548. See *Billgerry v. Branch*, 19 Grat. (Va.) 393, 100 A. D. 679.

<sup>23</sup> *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25; *Schutz v. Jordan*, 141 U. S. 213; *De Jarnette v. McDaniel*, 93 Ala. 215; *Penny-packer v. Capital Ins. Co.*, 80 Iowa, 56, 20 A. S. R. 395; *Sullivan v. Kuykendall*, 82 Ky. 483, 56 A. R. 901; *Huntley v. Whittier*, 105 Mass. 391, 7 A. R. 536; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447; *Plath v. Minn. F. M. F. Ins. Ass'n*, 23 Minn. 479, 23 A. R. 697; *Nat. Masonic Acc. Ass'n v. Burr*, 57 Neb. 437; *Austin v. Holland*, 69 N. Y. 571, 25 A. R. 246; *Jensen v. McCorkell*, 154 Pa. 323, 35 A. S. R. 843.

The presumption is sometimes said to be conclusive in the case of

for instance, the addressee testifies that he did not receive the letter, the presumption is dispelled, and the question of its receipt is one for the jury.<sup>24</sup> The presumption is one of law, however, so that, if no evidence is adduced by the addressee to rebut it, the presumption prevails.<sup>25</sup>

A like presumption arises with reference to the quasi public business of telegraph companies. If a telegram, properly addressed, is delivered, with proper charges, to the agent of a telegraph company at a sending office, for the purpose of transmission, the presumption is that it was delivered in the regular course of the company's business.<sup>26</sup>

a mailed notice of nonpayment or protest of negotiable paper. Properly speaking, however, there is no presumption in this respect. It is simply a rule of commercial law that posting a notice constitutes due diligence on the part of the holder, and it is accordingly immaterial whether the person liable receives it. *Sullivan v. Kuykendall*, 82 Ky. 483, 56 A. R. 901, 903; *Greenfield Bank v. Crafts*, 4 Allen (Mass.) 447, 457 (semble). See note 17, *supra*.

<sup>24</sup> *Rosenthal v. Walker*, 111 U. S. 185; *Home Ins. Co. v. Marple*, 1 Ind. App. 411; *Eckerly v. Alcorn*, 62 Miss. 228; *Hand v. Howell*, 61 N. J. Law, 142; *Moran v. Abbott*, 26 App. Div. (N. Y.) 570. And see *In re Constantinople & A. Hotel Co.*, L. R. 11 Eq. 86, 40 Law J. Ch. 39; *Ault v. Interstate S. & L. Ass'n*, 15 Wash. 627.

The fact that the addressee does not recollect receiving the letter does not overcome the presumption. *Ashley Wire Co. v. Ill. Steel Co.*, 164 Ill. 149, 56 A. S. R. 187; *East Tex. F. Ins. Co. v. Perkey*, 89 Tex. 604. See, however, *Austin v. Holland*, 69 N. Y. 571, 25 A. R. 246.

It has been held that this presumption does not constitute a sufficient foundation to justify the admission of secondary evidence of their contents, where the addressee, upon demand made to produce the letters, denied having received them. *Allen v. Blunt*, 2 Woodb. & M. 121, Fed. Cas. No. 217; *Freeman v. Morey*, 45 Me. 50, 71 A. D. 527. *Contra*, *Briggs v. Hervey*, 130 Mass. 186.

<sup>25</sup> *Pitts v. Hartford L. & A. Ins. Co.*, 66 Conn. 376, 50 A. S. R. 96; *Huntley v. Whittier*, 105 Mass. 391, 7 A. R. 536. *Contra*, *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25 (semble); *Tanner v. Hughes*, 53 Pa. 289.

<sup>26</sup> *White v. Flemming*, 20 N. S. 335; *Eppinger v. Scott*, 112 Cal. 369, 53 A. S. R. 220; *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 A. D. 712;

(b) **Private business.** A presumption of performance may arise with reference to private business, as well as public. Accordingly, if a regular and habitual mode of doing business by a certain person or a certain class of persons is shown, the presumption is that a particular act done by that person, or by one of that class, was performed in the usual manner.<sup>27</sup> So, if a statement of an account is made by a banker, and sent to the depositor, and the latter makes no objection within a reasonable time, the presumption is that the account is correct.<sup>28</sup>

§ 26. Performance and regularity of official acts.

(a) **Performance.** Generally speaking, there is no presumption that an officer has performed any particular act required of him by law, where that act is in its nature isolated and independent, and not incidental to or necessarily connected

*State v. Gritzner*, 134 Mo. 512; *Perry v. German American Bank*, 53 Neb. 89, 68 A. S. R. 593; *Or. S. S. Co. v. Otis*, 100 N. Y. 446, 53 A. R. 221; *Western Twine Co. v. Wright*, 11 S. D. 521, 44 L. R. A. 438.

This presumption is not conclusive; it may be rebutted. *Eppinger v. Scott*, *supra*; *Com. v. Jeffries*, *supra*.

<sup>27</sup> *Ivy v. Yancey*, 129 Mo. 501; *Fox v. Windes*, 127 Mo. 502, 48 A. S. R. 648; *Ashe v. Derosset*, 53 N. C. (8 Jones) 240; *Johnston v. Barfills*, 27 Or. 251, 50 A. S. R. 717. And see *Thomson v. Porter*, 4 Strob. Eq. (S. C.) 58, 53 A. D. 653.

Where it was the usage of an hotel to deposit all letters left at the bar in an urn kept for that purpose, whence they were sent frequently throughout the day to the rooms of the different guests to whom they were directed, it is presumed that a letter left at the bar for a particular guest was received by him. *Dana v. Kemble*, 19 Pick. (Mass.) 112.

<sup>28</sup> *First Nat. Bank v. Allen*, 100 Ala. 476, 46 A. S. R. 80; *Janin v. London & S. F. Bank*, 92 Cal. 14, 27 A. S. R. 82; *Ault v. Interstate S. & L. Ass'n*, 15 Wash. 627. And see *Webb v. Chambers*, 25 N. C. (3 Ired.) 374.

This presumption is rebuttable (*First Nat. Bank v. Allen*, *supra*), unless the creditor has been prejudiced by the debtor's acquiescence (*Janin v. London & S. F. Bank*, *supra*; *Weinstein v. Jefferson Nat. Bank*, 69 Tex. 38, 5 A. S. R. 23).

with some other official act which he is shown to have performed. Accordingly, the party to whose interest it is to show performance of the act is under the necessity of adducing evidence of its performance.<sup>29</sup> Where, for example, an officer acts under a naked statutory power, with a view to divest, upon certain contingencies, the title of a citizen,<sup>30</sup> as in the case of a sale of land for taxes or special assessments,<sup>31</sup>

<sup>29</sup> *U. S. v. Carr*, 132 U. S. 644, 652; *Sabariego v. Maverick*, 124 U. S. 261; *U. S. v. Ross*, 92 U. S. 281. And see *State v. Glisson*, 93 N. C. 506. See, however, *Finch v. Barclay*, 87 Ga. 393.

An officer's performance of a vital jurisdictional act cannot be indulged in favor of a right of action depending solely upon the performance of the act by him. *Albany v. McNamara*, 117 N. Y. 168. Thus, if a sheriff executes a certificate of purchase to one person, and afterwards makes a deed of the same property to another, it is not presumed that the grantee has succeeded to the rights of the certificate holder. *Hannah v. Chase*, 4 N. D. 351, 50 A. S. R. 656. See, however, *Cooper v. Granberry*, 33 Miss. 117.

If, however, an act required by law to be done by an officer appears to have been done, though by whom does not appear, the presumption is that the officer did it. *Conwell v. Watkins*, 71 Ill. 488.

There is no presumption that the duties of a private agent have been performed. *Ward v. Metropolitan L. Ins. Co.*, 66 Conn. 227, 50 A. S. R. 80.

<sup>30</sup> *Martin v. Rushton*, 42 Ala. 289; *Ft. Smith v. Dodson*, 51 Ark. 447, 14 A. S. R. 62.

If municipal officers destroy private property as a nuisance, without first condemning it by appropriate proceedings, the burden is on them, when sued by the owner, to show that it was in fact a nuisance. *Savannah v. Mulligan*, 95 Ga. 323, 51 A. S. R. 86. It has been held, however, that, in a collateral attack on condemnation proceedings, the presumption of regularity applies. *Leonard v. Sparks*, 117 Mo. 103, 38 A. S. R. 646.

<sup>31</sup> *Ronkendorff v. Taylor's Lessee*, 4 Pet. (U. S.) 349; *McClung v. Ross*, 5 Wheat. (U. S.) 116; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119; *Keane v. Cannovan*, 21 Cal. 291, 82 A. D. 738; *Nichols v. Bridgeport*, 23 Conn. 189, 60 A. D. 636; *McGahen v. Carr*, 6 Iowa, 331, 71 A. D. 421; *Terry v. Bleight*, 3 T. B. Mon. (Ky.) 270, 16 A. D. 101 (under act of congress); *Polk v. Rose*, 25 Md. 153, 89 A. D. 773; *Jackson v. Shepard*, 7 Cow. (N. Y.) 88, 17 A. D. 502; *Sharp v. Johnson*, 4 Hill (N. Y.)

the party claiming by virtue of the proceeding must show that every preliminary step required by law has been taken, else he shall fail.

If, however, it is shown that a particular act was performed by the officer in substance, a presumption arises, in the absence of evidence to the contrary, that in doing the act he also observed the formal requisites appertaining to it; as where some incidental act is required to be performed before, at the time of, or after performance of the principal act, or

92, 40 A. D. 259; *Townsend v. Downer's Estate*, 32 Vt. 183. *Contra*, *Shelbyville Water Co. v. People*, 140 Ill. 545, 16 L. R. A. 505; *Terry v. Bleight*, 3 T. B. Mon. (Ky.) 270, 16 A. D. 101 (under state law); *Ward's Lessee v. Barrows*, 2 Ohio St. 242. However, compliance with the statutory requisites may be proved by circumstances justifying a so-called presumption of fact. *Coxe v. Deringer*, 82 Pa. 236.

At common law, no presumption of regularity arises from the recitals in a tax deed. *Williams v. Peyton's Lessee*, 4 Wheat. (U. S.) 77; *Miller v. Miller*, 96 Cal. 376, 31 A. S. R. 229; *Keane v. Cannovan*, 21 Cal. 291, 82 A. D. 738; *Brown v. Castellaw*, 33 Fla. 204, 211; *Worthing v. Webster*, 45 Me. 270, 71 A. D. 543; *Jackson v. Shepard*, 7 Cow. (N. Y.) 88, 17 A. D. 502; *Hilton v. Bender*, 69 N. Y. 75; *Brown v. Wright*, 17 Vt. 97, 42 A. D. 481. This rule has been altered in many states by statute, so that the tax deed makes a prima facie case of regularity. *Pillow v. Roberts*, 12 Ark. 822; *Washington v. Hosp*, 43 Kan. 324, 19 A. S. R. 141. And see *State v. Mastin*, 103 Mo. 508. This statutory presumption is rebuttable. *De Frieze v. Quint*, 94 Cal. 653, 28 A. S. R. 151; *Skinner v. Brown*, 17 Ohio St. 33; *Hurd v. Brinner*, 3 Wash. 1, 28 A. S. R. 17.

Property shown to have been once exempt is presumed to continue so. *Allen County Com'rs v. Simons*, 129 Ind. 193, 13 L. R. A. 512. However, the burden of showing that he has not received the benefit of an exemption rests upon the tax payer. *South Nashville St. R. Co. v. Morrow*, 87 Tenn. 406, 2 L. R. A. 853.

The presumption of regularity is applied to a certain extent to tax proceedings, however, as will be seen in the following cases:

*Regularity of assessment.* *Perkins v. Nugent*, 45 Mich. 156; *State v. Williams*, 99 Mo. 291.

*Consideration of benefits in fixing taxing district for local improvement.* *King v. Portland*, 38 Or. 402, 55 L. R. A. 812.

*Equalization of assessments.* *Guy v. Washburn*, 23 Cal. 111.

after the performance of one act and before the performance of another. Accordingly, if it is material to a party's case to show that the incidental act was not performed by the officer in connection with the principal act, the burden is on that party to adduce evidence of the irregularity.<sup>22</sup> This presumption of regularity, it will be observed, applies only to an official duty in the performance of which the officer is required to perform, either concurrently or consecutively, sev-

<sup>22</sup> *Rex v. Whiston*, 4 Adol. & E. 607; *Adams v. Cowles*, 95 Mo. 501, 6 A. S. R. 74; *Ward's Lessee v. Barrows*, 2 Ohio St. 242.

*Issuance of extradition warrant—Proof of flight from justice presumed.* *State v. Justus*, 84 Minn. 237, 55 L. R. A. 325.

*Increase of capital stock—Prior payment of tax therefor presumed.* *Peck v. Elliott*, 47 U. S. App. 605, 79 Fed. 10, 38 L. R. A. 616.

*Issuance of execution by clerk—Prior direction of party presumed.* *Niantic Bank v. Dennis*, 37 Ill. 381.

*Land grant—Prior filing of warrant presumed.* *Hickman v. Boffman*, Hardin (Ky.) 356.

*Municipal election—Prior notice presumed.* *Knox County v. Ninth Nat. Bank*, 147 U. S. 91.

*Patent and town company deed—Proper proceedings presumed.* *Mathews v. Buckingham*, 22 Kan. 166.

*Renewal of patent for invention—Requisite proofs presumed.* *Phila. & T. R. Co. v. Stimpson*, 14 Pet. (U. S.) 448.

*Seizure by one of two overseers—Consent of other presumed.* *Downing v. Rugar*, 21 Wend. (N. Y.) 178, 34 A. D. 223.

*Enactment of statute—Consent of persons affected presumed.* *Wellington's Case*, 16 Pick. (Mass.) 87, 26 A. D. 631.

*Grant of warning order by clerk of court—Oath to affidavit presumed.* *Sears v. Sears*, 95 Ky. 173, 44 A. S. R. 213.

*Swamp-land patent—Recordation presumed.* *Nitche v. Earle*, 117 Ind. 270.

*Sheriff's sale—Proper delivery of writ to levying officer presumed.* *Leger v. Doyle*, 11 Rich. Law (S. C.) 109, 70 A. D. 240. *Prior levy presumed.* *Greer v. Wintersmith*, 85 Ky. 516, 7 A. S. R. 613; *Hartwell v. Root*, 19 Johns. (N. Y.) 345, 10 A. D. 232. *Advertisement presumed.* *Culbertson v. Milhollin*, 22 Ind. 362, 85 A. D. 428. *Posting of notice presumed.* *Wood v. Morehouse*, 45 N. Y. 368.

This rule involves the maxim, *Probatu extremis, praesumuntur media*.



eral acts which are accordingly related, connected, and interdependent; and it applies only when a principal act is established by evidence, and only to formalities attached by law to the act. It does not dispense with proof of the principal act itself, but only of incidents thereto.<sup>33</sup>

While, as we have seen, there is not, generally speaking, any presumption that an officer has performed his duty in any particular respect, neither is there, on the other hand, any presumption that he has failed to perform it. If a party's case depends for its validity upon the performance of an official duty in some respect, there is not ordinarily any presumption to help him out. He must prove it. If, on the other hand, his case depends upon the nonperformance of an official duty in a certain particular, he must likewise prove that. There is no presumption to aid him. If, for instance, a certain class of documents is required by law to be kept in a certain public office, and a particular instrument of that class cannot be found there, the presumption is that it never existed.<sup>34</sup> Any contrary presumption would involve the assumption of a violation of duty, either on the part of the person whose business it was to deposit the instrument in the office, or on the part of the custodian safely to keep it. So far, then, as isolated and independent official acts are concerned, there is no presumption either for or against their having been performed, and the burden of adducing evidence of performance or of nonperformance rests on the party who, by the rules of pleading or substantive law, is bound to show that the act was or was not done, as the case may be.

(b) **Regularity.** When it appears that an officer has done

<sup>33</sup> See cases cited in notes 29-31, *supra*.

<sup>34</sup> *Morrill v. Douglass*, 14 Kan. 293; *Hall v. Kellogg*, 16 Mich. 135.

This presumption is by no means conclusive. *Morrill v. Douglass*, *supra*.

some act in his official capacity, the presumption is that he has done it regularly and correctly.<sup>35</sup> Thus, in the absence of

<sup>35</sup> *Reg. v. Broadhempston*, 28 Law J. M. Cas. 18; *Butler v. Allnutt*, 1 Starkie, 222; *U. S. v. Weed*, 5 Wall. (U. S.) 62; *U. S. v. Jones*, 31 Fed. 718; *Templeton v. Morgan*, 16 La. Ann. 438; *Hamilton v. McConkey's Adm'r*, 83 Va. 533.

*Transfer of public lands.* *Minter v. Crommelin*, 18 How. (U. S.) 87; *Lea v. Polk County Copper Co.*, 21 How. (U. S.) 493; *Lamm v. C., St. P., M. & O. R. Co.*, 45 Minn. 71, 10 L. R. A. 268; *State v. Wayne County Ct.*, 98 Mo. 362; *Dolph v. Barney*, 5 Or. 191; *Allegheny v. Nelson*, 25 Pa. 332; *Tipton v. Sanders*, 2 Head (Tenn.) 690; *Willis v. Lewis*, 28 Tex. 185; *Quinlan v. H. & T. C. R. Co.*, 89 Tex. 356.

*Service of process.* *State v. Wenzel*, 77 Ind. 428; *Wilkins v. Tourtellott*, 42 Kan. 176; *Case v. Colston*, 1 Metc. (Ky.) 145; *Shorey v. Hussey*, 32 Me. 579; *Richardson v. Smith*, 1 Allen (Mass.) 541.

*Notarial acts.* *Squier v. Stockton*, 5 La. Ann. 120, 52 A. D. 583; *Laune's Succession*, 6 La. Ann. 530.

*Apportionment of county into assembly districts.* *Baird v. Kings County Sup'rs*, 138 N. Y. 95.

*Changes in plans of county buildings.* *Gibson County Com'rs v. Cincinnati Steam Heat Co.*, 128 Ind. 240, 12 L. R. A. 502.

*Civil-service classification.* *Chittenden v. Wurster*, 152 N. Y. 345, 37 L. R. A. 809.

*Issuance of warrant on state treasury.* *Nat. Bank of D. O. Mills & Co. v. Herold*, 74 Cal. 603, 5 A. S. R. 476.

*Public accounts.* *Hemingway v. State*, 68 Miss. 371.

*Record of deed.* *Forsaith v. Clark*, 21 N. H. 409.

*Removal of officer.* *People v. Martin*, 19 Colo. 565, 24 L. R. A. 201; *Dubuc v. Voss*, 19 La. Ann. 210, 92 A. D. 526; *State v. Prince*, 45 Wis. 610.

*Election contest before legislature.* *Taylor v. Beckham*, 108 Ky. 278, 94 A. S. R. 357.

This presumption applies in favor of the acts of foreign officers (*Frierson v. Galbraith*, 80 Tenn. 129; *Gonzales v. Ross*, 120 U. S. 605; *Sadler v. Anderson*, 17 Tex. 245), unless the act is contrary to or beyond the usual scope of the duties of officers of the class to which the office in question belongs (*Jones v. Muisbach*, 26 Tex. 235).

The presumption has been applied to agents. If a deed executed by an agent is apparently within the scope of his power, the presumption is that, in making it, he performed his duty to his principal. *Clements v. Macheboeuf*, 92 U. S. 418.

No presumption arises in favor of the regularity of an assessment

evidence to the contrary, public surveys are presumed to be correct,<sup>36</sup> and laws are presumed to have been regularly enacted,<sup>37</sup> and the regularity of all proceedings leading up to a judicial sale will be presumed.<sup>38</sup> In connection with judicial

by a mutual benefit society, however. *American Mut. Aid Soc. v. Helburn*, 85 Ky. 1, 7 A. S. R. 571.

<sup>36</sup> *Ashe v. Lanham*, 5 Ind. 434; *Trotter v. St. L. Public Schools*, 9 Mo. 69. And see *Harris' Lessee v. Burchan*, 1 Wash. C. C. 191, Fed. Cas. No. 6,117; *Baeder v. Jennings*, 40 Fed. 199.

This presumption is rebuttable. *Barnhart v. Ehrhart*, 33 Or. 274.

<sup>37</sup> *Perry County v. S., M. & M. R. Co.*, 58 Ala. 546; *People v. Dunn*, 80 Cal. 211, 13 A. S. R. 118; *People v. Loewenthal*, 93 Ill. 191; *Bedard v. Hall*, 44 Ill. 91; *Taylor v. Beckham*, 21 Ky. L. R. 1735, 56 S. W. 177, 49 L. R. A. 258; *Hollingsworth v. Thompson*, 45 La. Ann. 222, 40 A. S. R. 220; *People v. McElroy*, 72 Mich. 446, 2 L. R. A. 609; *Bound v. Wis. Cent. R. Co.*, 45 Wis. 543.

*Quorum.* *State v. Ellington*, 117 N. C. 158, 53 A. S. R. 580.

*Third reading or suspension of rules.* *Schuyler County Sup'rs v. People*, 25 Ill. 181; *In re Ellis' Estate*, 55 Minn. 401, 43 A. S. R. 514.

*Constitutional majority on third reading.* *Williams v. State*, 6 Lea (Tenn.) 549.

*Assent of senate and house and approval of governor.* Opinion of the Justices, 52 N. H. 622.

*Regularity of amendment.* *Miller v. State*, 3 Ohio St. 475.

This presumption may be overcome by the legislative journals. *State v. Swan*, 7 Wyo. 166, 40 L. R. A. 195.

<sup>38</sup> *Ritter v. Scannell*, 11 Cal. 238, 70 A. D. 775; *Hitchcock v. Hahn*, 60 Mich. 459; *Agan v. Shannon*, 103 Mo. 661; *Wood v. Chapin*, 13 N. Y. 509, 67 A. D. 62 (semble); *Smith v. Crosby*, 86 Tex. 15, 40 A. S. R. 818; *Tacoma Grocery Co. v. Draham*, 8 Wash. 263, 40 A. S. R. 907.

*Prior certification to circuit court of judgment of common pleas.* *Bailey v. Winn*, 101 Mo. 649.

*Indorsement of writ by proper court.* *Thomas v. Malcom*, 39 Ga. 328, 99 A. D. 459.

*Nonexcessiveness of levy.* *Hefner v. Hease*, 29 La. Ann. 149.

*Judgment debtors' ownership of property levied on.* *Hogue v. Corbit*, 156 Ill. 540, 47 A. S. R. 232.

*Vacancy of land.* *Drysdale v. Biloxi Canning Co.*, 67 Miss. 534.

*Retention of writ until sale.* *Bradley v. Sandilands*, 66 Minn. 40, 61 A. S. R. 386.

*Compliance with law as to place of posting notice.* *Evans v. Rob-*

sales, another presumption, so-called, may be mentioned. Where an authority is given by law to guardians, personal representatives, sheriffs, or other officers to make sales of lands upon being licensed by the courts, and they are required to advertise the sales in a particular manner, and to observe other formalities in their proceedings, the lapse of sufficient time (which, in most cases, is fixed at twenty years), coupled with possession on the part of those claiming under the sale, is said to raise a conclusive presumption that all legal formalities of the sale were observed.<sup>39</sup> This so-called presump-

berson, 92 Mo. 192, 1 A. S. R. 701. And see *Drake v. Mooney*, 31 Vt. 617, 76 A. D. 145.

*Notice of sale under trust deed.* *Tyler v. Herring*, 67 Miss. 169, 19 A. S. R. 263.

*Compliance with law as to time and place of sale.* *Kendrick v. Latham*, 25 Fla. 819; *Childs v. McChesney*, 20 Iowa, 431, 89 A. D. 545; *Blodgett v. Perry*, 97 Mo. 263, 10 A. S. R. 307; *Howard v. North*, 5 Tex. 290, 51 A. D. 769.

*Sufficiency of price.* *Price v. Springfield R. E. Ass'n*, 101 Mo. 107, 20 A. S. R. 595.

*Transfer of bidder's rights to grantee in sheriff's deed.* *Cooper v. Granberry*, 33 Miss. 117. See, however, *Hannah v. Chase*, 4 N. D. 351, 50 A. S. R. 656.

Confirmation of a sale cannot be presumed, however. *Walker v. Jessup*, 43 Ark. 163.

<sup>39</sup> See 1 Greenl. Ev. § 20; *Bustard v. Gates*, 4 Dana (Ky.) 429.

*Administrators' and executors' sales.* *Austin v. Austin*, 50 Me. 74, 79 A. D. 597; *Price v. Springfield R. E. Ass'n*, 101 Mo. 107, 20 A. S. R. 595; *Winkley v. Kaime*, 32 N. H. 268; *Gray v. Gardner*, 3 Mass. 399; *Battles v. Holley*, 6 Me. 145; *Wyatt's Adm'r v. Scott*, 33 Ala. 313. And see *Stevenson's Heirs v. McReary*, 12 Smedes & M. (Miss.) 9, 51 A. D. 102; *Agan v. Shannon*, 103 Mo. 661.

*Guardians' sales.* *Seward v. Didier*, 16 Neb. 58.

*Sheriffs' sales.* *Drouet v. Rice*, 2 Rob. (La.) 374; *Hammond v. Gordon*, 93 Mo. 223. And see *Drake v. Duvenick*, 45 Cal. 455.

*Tax sales.* *Freeman v. Thayer*, 33 Me. 76. And see *Pejepscut Proprietors v. Ransom*, 14 Mass. 145; *Blossom v. Cannon*, 14 Mass. 177; *Colman v. Anderson*, 10 Mass. 105.

Lapse of time alone is not sufficient to raise the presumption. It

tion is not truly such. It is a rule of substantive law that after the lapse of time, coupled with possession, the titular owner cannot defeat the sale for irregularities.

The presumption of regularity is applied in favor of the acts of municipal officers.<sup>40</sup> It is presumed that, in organizing a municipal corporation, the authorities acted with regularity;<sup>41</sup> and that, in enacting ordinances<sup>42</sup> and in making contracts,<sup>43</sup> the officers of the municipality acted properly, and observed the formalities imposed by law.

In an election contest, the presumption is that the official count is correct, and the burden of proof rests, accordingly, on the contestant.<sup>44</sup> He must therefore establish that excluded ballots, which he claims were cast for him, are genuine bal-

must be coupled with long possession on the part of those claiming under the deed. *Worthing v. Webster*, 45 Me. 270, 71 A. D. 543. And see *Eldridge v. Knott*, Cowp. 214.

<sup>40</sup> *Knox County v. Ninth Nat. Bank*, 147 U. S. 91; *Lostutter v. Aurora*, 126 Ind. 436; *Mussey v. White*, 3 Me. 290; *Henry v. Dulle*, 74 Mo. 443; *Hudson County v. State*, 24 N. J. Law, 718; *Perry v. Salt Lake City*, 7 Utah, 143, 11 L. R. A. 446.

<sup>41</sup> *People v. Farnham*, 35 Ill. 562. And see *Bassett v. Porter*, 4 Cush. (Mass.) 487; *New-Boston v. Dunbarton*, 12 N. H. 409.

Organization of private corporations, see § 28(a), *infra*.

<sup>42</sup> *Van Buren v. Wells*, 53 Ark. 368, 22 A. S. R. 214; *Bayard v. Baker*, 76 Iowa, 220; *Duluth v. Krupp*, 46 Minn. 435; *Barber Asphalt Pav. Co. v. Hunt*, 100 Mo. 22, 18 A. S. R. 530; *Consol. Traction Co. v. Elizabeth*, 58 N. J. Law, 619, 32 L. R. A. 170; *Trenton H. R. Co. v. Trenton*, 53 N. J. Law, 132, 11 L. R. A. 410; *Wood v. Seattle*, 23 Wash. 1, 52 L. R. A. 369. *Contra*, *Schott v. People*, 89 Ill. 195.

<sup>43</sup> *New Orleans v. Halpin*, 17 La. Ann. 185, 87 A. D. 523. And see *Jackson School Tp. v. Hadley*, 59 Ind. 534.

<sup>44</sup> *Powell v. Holman*, 50 Ark. 85; *Hartman v. Young*, 17 Or. 150, 11 A. S. R. 787; *State v. Norton*, 46 Wis. 332. And see *State v. Walsh*, 62 Conn. 260, 17 L. R. A. 364. See, also, note 8, *supra*.

This presumption is rebuttable. *Powell v. Holman*, 50 Ark. 85; *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 A. S. R. 349; *People v. Pease*, 27 N. Y. 45, 84 A. D. 242; *State v. Norton*, 46 Wis. 332. And see *People v. Grand County Com'rs*, 6 Colo. 202.

lots lawfully cast at the election, in order to overcome the presumption of regularity attaching to the official count;<sup>45</sup> and if he claims that the ballots cast for the adverse party are invalid, he must prove that fact.<sup>46</sup>

If a person holding two offices has done an act which would be authorized in one of his capacities, and not in the other, the presumption is that the act was done in the exercise of the proper office.<sup>47</sup>

The presumption just considered, it will be observed, constitutes a *prima facie* case, not that an official act has been done, but that an official act which is otherwise shown to have been done has been done regularly and correctly.

(c) **Nature and qualification of presumption.** The presumption of performance of official acts does not apply where the act in question is of a class required by law to be evidenced by a public document or record. If the record or document is not produced, its absence must therefore be accounted for, and it must be supplied by secondary evidence.<sup>48</sup> Nor will a presumption in favor of the regularity of an official act be indulged if it militates against the regularity of

<sup>45</sup> *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 A. S. R. 349; *Hartman v. Young*, 17 Or. 150, 11 A. S. R. 787; *Fenton v. Scott*, 17 Or. 189, 11 A. S. R. 801.

<sup>46</sup> *Russell v. McDowell*, 83 Cal. 70; *Dorsey v. Brigham*, 177 Ill. 250, 69 A. S. R. 228; *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 A. S. R. 349; *Beardstown v. Virginia City*, 76 Ill. 34; *Gumm v. Hubbard*, 97 Mo. 311, 10 A. S. R. 312; *Boyer v. Teague*, 106 N. C. 576, 19 A. S. R. 547. And see *State v. Walsh*, 62 Conn. 260, 17 L. R. A. 364.

If fraud at a particular precinct is shown, the entire vote must be rejected unless the party claiming the benefit of votes cast there shows that they are valid. *Lloyd v. Sullivan*, 9 Mont. 577.

<sup>47</sup> *Whittington v. Whittington*, 24 La. Ann. 157; *Jay v. Carthage*, 48 Me. 353; *Owen v. Baker*, 101 Mo. 407, 20 A. S. R. 618. And see *Ivy v. Yancey*, 129 Mo. 501.

<sup>48</sup> *Brunswick v. McKean*, 4 Me. 508. And see *Pearsall v. Eaton County Sup'rs*, 71 Mich. 438; *Hilton v. Bender*, 69 N. Y. 75.

some other official act.<sup>49</sup> And these presumptions apply in favor of official acts only. The private acts of an officer stand on the same footing as the private acts of other men.<sup>50</sup>

This is not a conclusive presumption. Its effect is to cast the burden of adducing evidence of irregularity or nonperformance upon the party against whom it operates.<sup>51</sup> And when such evidence is adduced, the presumption disappears, and the question becomes one of fact for the jury to determine upon all the evidence, without reference to any presumption.<sup>52</sup>

#### § 27. Judicial proceedings.

(a) **Jurisdiction.** It is a maxim of the law that nothing is intended to be out of the jurisdiction of a superior court but that which expressly appears to be so. Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed, upon a collateral attack, that the court, if of superior jurisdiction, has acted with due au-

<sup>49</sup> *Houghton County Sup'rs v. Rees*, 34 Mich. 481; *Gibson v. Martin*, 7 Humph. (Tenn.) 127, 128.

<sup>50</sup> *Hannah v. Chase*, 4 N. D. 351, 50 A. S. R. 656; *Murphy v. Chase*, 103 Pa. 260.

<sup>51</sup> *Minter v. Crommelin*, 18 How. (U. S.) 87; *People v. Grand County Com'rs*, 6 Colo. 202; *Sage v. Board of Liquidation*, 37 La. Ann. 412; *Farr v. Sims*, Rich. Eq. Cas. (S. C.) 122, 24 A. D. 396; *Sternberger v. McSween*, 14 S. C. 35.

Rebuttal of presumption of delivery of letters, see § 25(a), *supra*; of delivery of telegrams, see note 26, *supra*; of correctness of public surveys, see note 36, *supra*; of correctness of election returns, see note 44, *supra*; of authority of attorney at law, see § 24, *supra*; of correctness of stated account, see note 28, *supra*; of regularity of enactment of laws, see note 37, *supra*; of regularity of tax proceedings, see note 31, *supra*.

The presumption of regularity of certain judicial sales becomes conclusive after long lapse of time, coupled with possession on the part of those claiming under the sale. See page 94, *supra*.

<sup>52</sup> *People v. Sanders*, 114 Cal. 216, 236.

thority, and its judgment is as valid as if every fact necessary to give it jurisdiction affirmatively appeared.<sup>53</sup>

So far as domestic judgments are concerned, this presumption may be indulged as to facts only. There is no presumption that the law gives the court jurisdiction over any particular class of cases, since this is a question of domestic law, as to which there is no room for any presumption. If, for instance, a statute purporting to confer jurisdiction in a certain class of cases is void, no presumption can be indulged that the court had jurisdiction of any case of that class.<sup>54</sup>

The presumption of jurisdiction arises with reference, not only to the subject-matter, but also to the person of the defendant.<sup>55</sup> Thus, it is presumed in favor of a domestic judg-

<sup>53</sup> ENGLAND: *Peacock v. Bell*, 1 Saund. 73.

UNITED STATES: *Galpin v. Page*, 18 Wall. 350; *Florentine v. Barton*, 2 Wall. 210; *Foster v. Givens*, 31 U. S. App. 626.

ALABAMA: *Thompson v. Thompson*, 91 Ala. 591, 11 L. R. A. 443.

ARKANSAS: *Marks v. Matthews*, 50 Ark. 338.

CALIFORNIA: *In re Warfield's Will*, 22 Cal. 51, 83 A. D. 49.

GEORGIA: *Wiggins v. Gillette*, 93 Ga. 20, 44 A. S. R. 123; *Bush v. Lindsey*, 24 Ga. 245, 71 A. D. 117.

INDIANA: *Godfrey v. Godfrey*, 17 Ind. 6, 79 A. D. 448; *Hancock County Com'rs v. Leggett*, 115 Ind. 544; *Houk v. Barthold*, 73 Ind. 21.

KANSAS: *English v. Woodman*, 40 Kan. 752.

MISSISSIPPI: *Ames v. Williams*, 72 Miss. 760.

OHIO: *Maxsom's Lessee v. Sawyer*, 12 Ohio, 195.

RHODE ISLAND: *Thornton v. Baker*, 15 R. I. 553, 2 A. S. R. 925.

TEXAS: *Harris v. Daugherty*, 74 Tex. 1, 15 A. S. R. 812; *Withers v. Patterson*, 27 Tex. 491, 86 A. D. 643; *Houston v. Killough*, 80 Tex. 296 (semble). And see 8 Current Law, 616.

<sup>54</sup> *In re Christensen*, 17 Utah, 412, 70 A. S. R. 794.

<sup>55</sup> UNITED STATES: *Florentine v. Barton*, 2 Wall. 210; *Sprague v. Litherberry*, 4 McLean, 442, Fed. Cas. No. 13,251; *Galpin v. Page*, 18 Wall. 350; *Foster v. Givens*, 31 U. S. App. 626; *Applegate v. L. & C. C. Min. Co.*, 117 U. S. 255.

ALABAMA: *Weaver v. Brown*, 87 Ala. 533.

CALIFORNIA: *Sichler v. Look*, 93 Cal. 600; *Eichhoff v. Eichhoff*, 107 Cal. 42, 48 A. S. R. 110; *In re Eichhoff's Estate*, 101 Cal. 600; *Hahn v. Kelly*, 34 Cal. 391, 94 A. D. 742.



ment, based on the appearance of an attorney, that he was authorized to appear, even where there was no service of process.<sup>56</sup> And if the filing of an affidavit by the plaintiff is a prerequisite to an order for the publication of summons, and

CONNECTICUT: *Coit v. Haven*, 30 Conn. 190, 79 A. D. 244.

GEORGIA: *Doe d. Bush v. Lindsey*, 24 Ga. 245, 71 A. D. 117; *Reinhart v. Blackshear*, 105 Ga. 799.

ILLINOIS: *Wenner v. Thornton*, 98 Ill. 156; *Kenney v. Greer*, 13 Ill. 432, 54 A. D. 439; *Swearengen v. Gullick*, 67 Ill. 208; *Logan v. Williams*, 76 Ill. 175; *Nickrans v. Wilk*, 161 Ill. 76.

INDIANA: *Horner v. State Bank*, 1 Ind. 130, 48 A. D. 355.

KENTUCKY: *Jones v. Edwards*, 78 Ky. 6.

MASSACHUSETTS: *Brown v. Wood*, 17 Mass. 68.

MICHIGAN: *Palmer v. Oakley*, 2 Doug. 433, 47 A. D. 41.

MINNESOTA: *Stahl v. Mitchell*, 41 Minn. 325.

MISSOURI: *Freeman v. Thompson*, 53 Mo. 183.

NEW YORK: *Gridley v. St. Francis Xavier's College*, 137 N. Y. 327; *Foot v. Stevens*, 17 Wend. 483.

OHIO: *Reynolds v. Stansbury*, 20 Ohio, 344, 55 A. D. 459; *Richards v. Skiff*, 8 Ohio St. 586.

SOUTH DAKOTA: *Stoddard Mfg. Co. v. Mattice*, 10 S. D. 253.

So far as judgments *in personam* are concerned, it has been held that the presumption is limited to judgments against persons within the territorial limits of the court. *Galpin v. Page*, 18 Wall. (U. S.) 350; *Stewart v. Anderson*, 70 Tex. 588; *Cunningham v. Spokane Hydraulic Co.*, 18 Wash. 524.

<sup>56</sup> *Prince v. Griffin*, 16 Iowa, 552; *Gemmell v. Rice*, 13 Minn. 400. And see *Harshey v. Blackmarr*, 20 Iowa, 161, 89 A. D. 520; *Reynolds v. Fleming*, 30 Kan. 106, 46 A. R. 86; *Dorsey v. Kyle*, 30 Md. 512, 96 A. D. 617; *Bunton v. Lyford*, 37 N. H. 512, 75 A. D. 144; *Callen v. Ellison*, 13 Ohio St. 446, 82 A. D. 448; 2 Clark & S. Agency, 1380. See, also, page 83, *supra*.

In the absence of evidence of want of authority, the presumption applies to foreign judgments. *Lawrence v. Jarvis*, 32 Ill. 304.

In a collateral proceeding, the presumption is conclusive. *Carpenter v. Oakland*, 30 Cal. 439; *Corbitt v. Timmerman*, 95 Mich. 581, 85 A. S. R. 586; *Cochran v. Thomas*, 131 Mo. 258; *Deegan v. Deegan*, 22 Nev. 185, 58 A. S. R. 742; *Brown v. Nichols*, 42 N. Y. 26. And see *Finneran v. Leonard*, 7 Allen (Mass.) 54, 83 A. D. 665; *Callen v. Ellison*, 13 Ohio St. 446, 82 A. D. 448. And the presumption is conclusive in favor of a purchaser under the judgment, even in a subsequent direct attack. *Williams v. Johnson*, 112 N. C. 424, 34 A. S. R. 513.

the record is silent on the subject, it will be presumed, in favor of the judgment, that the affidavit was duly filed.<sup>57</sup>

If, however, a statute expressly requires the existence of a jurisdictional fact affirmatively to appear, its existence cannot be presumed.<sup>58</sup> The common illustration of this exception arises under statutes allowing service of initial process by publication as a substitute for personal service. In such cases, it has been held, all the statutory prerequisites must appear of record.<sup>59</sup>

The presumption of jurisdiction arises in favor of the judgments of courts of superior jurisdiction only, and not in favor of the acts of courts whose jurisdiction is inferior.<sup>60</sup> The dis-

<sup>57</sup> *Hahn v. Kelly*, 34 Cal. 391, 94 A. D. 742; *Newcomb's Ex'rs v. Newcomb*, 13 Bush (Ky.) 544, 26 A. R. 222; *Adams v. Cowles*, 95 Mo. 501, 6 A. S. R. 74.

<sup>58</sup> *Cooper v. Sunderland*, 3 Iowa, 114, 66 A. D. 52; *Shenandoah V. R. Co. v. Ashby's Trustees*, 86 Va. 232, 19 A. S. R. 898.

<sup>59</sup> *McMinn v. Whelan*, 27 Cal. 300; *Frybarger v. McMillen*, 15 Colo. 349; *Brownfield v. Dyer*, 7 Bush (Ky.) 505; *Palmer v. McMaster*, 8 Mont. 186; *Denning v. Corwin*, 11 Wend. (N. Y.) 647; *Spillman v. Williams*, 91 N. C. 483. And see *Boyland v. Boyland*, 18 Ill. 551.

<sup>60</sup> ENGLAND: *Peacock v. Bell*, 1 Saund. 73; *Reg. v. Totness*, 11 Q. B. 80.

UNITED STATES: *Kempe's Lessee v. Kennedy*, 5 Cranch, 173; *Galpin v. Page*, 18 Wall. 350.

CALIFORNIA: *Hahn v. Kelly*, 34 Cal. 391, 94 A. D. 742.

CONNECTICUT: *Hall v. Howd*, 10 Conn. 514, 27 A. D. 696; *Coit v. Haven*, 30 Conn. 190, 79 A. D. 244.

FLORIDA: *McGehee v. Wilkins*, 31 Fla. 86.

ILLINOIS: *Anderson v. Gray*, 134 Ill. 550, 23 A. S. R. 696; *Swearengen v. Gullick*, 67 Ill. 208.

IOWA: *Cooper v. Sunderland*, 3 Iowa, 114, 66 A. D. 52.

KENTUCKY: *Adams v. Tiernan*, 5 Dana, 394.

MARYLAND: *Shivers v. Wilson*, 5 Har. & J. 130, 9 A. D. 497.

MASSACHUSETTS: *Piper v. Pearson*, 2 Gray, 120, 61 A. D. 438.

MICHIGAN: *Palmer v. Oakley*, 2 Doug. 433, 47 A. D. 41.

NEW HAMPSHIRE: *Goulding v. Clark*, 34 N. H. 148.

NEW JERSEY: *Graham v. Whitely*, 26 N. J. Law, 254, 262.

strict and circuit courts of the United States<sup>61</sup> and courts of probate<sup>62</sup> are courts of superior jurisdiction, within the meaning of this rule, while justices of the peace are generally courts of inferior jurisdiction.<sup>63</sup>

NEW YORK: *Gilbert v. York*, 111 N. Y. 544.

OHIO: *Reynolds v. Stansbury*, 20 Ohio, 344, 55 A. D. 459.

TENNESSEE: *Hopper v. Fisher*, 2 Head, 253.

TEXAS: *Horan v. Wahrenberger*, 9 Tex. 313, 58 A. D. 145.

<sup>61</sup> *Evers v. Watson*, 156 U. S. 527; *Erwin v. Lowry*, 7 How. (U. S.) 172; *Stanley's Adm'r v. Bank of N. A.*, 4 Dall. (U. S.) 8; *Byers v. Fowler*, 12 Ark. 218, 54 A. D. 271; *Thoms v. Southard*, 2 Dana (Ky.) 475, 26 A. D. 467; *Pierro v. St. P. & N. P. R. Co.*, 37 Minn. 314; *Goodsell v. Delta & P. L. Co.*, 72 Miss. 580; *Reed v. Vaughan*, 15 Mo. 137, 55 A. D. 133; *Ruckman v. Cowell*, 1 N. Y. 505. *Contra*, *Kempe's Lessee v. Kennedy*, 5 Cranch (U. S.) 173, 185 (semble); *Lowry v. Erwin*, 6 Rob. (La.) 192, 39 A. D. 556.

<sup>62</sup> ALABAMA: *Henley v. Johnston*, 134 Ala. 646, 92 A. S. R. 48; *Wyatt's Adm'r v. Steele*, 26 Ala. 639.

ARKANSAS: *Apel v. Kelsey*, 52 Ark. 341, 20 A. S. R. 183.

CALIFORNIA: *Irwin v. Scriber*, 18 Cal. 499; *Hahn v. Kelly*, 34 Cal. 391, 94 A. D. 742 (statute).

GEORGIA: *Gamble v. Cent. R. & B. Co.*, 80 Ga. 595, 12 A. S. R. 276; *Tucker v. Harris*, 13 Ga. 1, 58 A. D. 488; *Doe d. Bush v. Lindsey*, 24 Ga. 245, 71 A. D. 117.

ILLINOIS: *People v. Medart*, 166 Ill. 348; *People v. Cole*, 84 Ill. 327.

KENTUCKY: *Fletcher's Adm'r v. Sanders*, 7 Dana, 345, 32 A. D. 96.

MINNESOTA: *Davis v. Hudson*, 29 Minn. 27.

MISSOURI: *Price v. Springfield R. E. Ass'n*, 101 Mo. 107, 20 A. S. R. 595; *Sherwood v. Baker*, 105 Mo. 472, 24 A. S. R. 399.

NEW HAMPSHIRE: *Kimball v. Fisk*, 39 N. H. 110, 75 A. D. 213.

PENNSYLVANIA: *Wall v. Wall*, 123 Pa. 545, 10 A. S. R. 549.

TENNESSEE: *Townsend v. Townsend*, 4 Cold. 70, 94 A. D. 184; *Brien v. Hart*, 6 Humph. 130.

TEXAS: *Lyne v. Sanford*, 82 Tex. 58, 27 A. S. R. 852; *Weems v. Marterson*, 80 Tex. 45; *Murchison v. White*, 54 Tex. 78.

And see *Redmond v. Anderson*, 18 Ark. 449; *Roderigas v. E. R. Sav. Inst.*, 63 N. Y. 460, 20 A. R. 555; *Schultz v. Schultz*, 10 Grat. (Va.) 358, 60 A. D. 335; *Jackson v. Astor*, 1 Pin. (Wis.) 137, 39 A. D. 281.

<sup>63</sup> *Rex v. Parish of All Saints*, 7 Barn. & C. 785; *Levy v. Shurman*, 6 Ark. 182, 42 A. D. 690; *Rowley v. Howard*, 23 Cal. 401; *Hahn v. Kelly*, 34 Cal. 391, 94 A. D. 742; *Swain v. Chase*, 12 Cal. 283; *Evans v. Bouton*, 85 Ill. 579; *Hopper v. Lucas*, 86 Ind. 43, 46; *Smith v. Claus-*

Moreover, in some jurisdictions, the presumption of jurisdiction applies in favor of superior courts only when they have acted as such. It does not arise with reference to statutory proceedings which run contrary to the course of the common law. In the exercise of special powers conferred on them by statute, the courts are treated as of inferior jurisdiction. Accordingly, when these proceedings are relied on to sustain a judgment, the jurisdictional facts must appear of record; they cannot be presumed.<sup>64</sup> Thus, in some states, the presumption does not apply in favor of judgments and decrees of probate

meler, 136 Ind. 105, 43 A. S. R. 311; *Inman v. Whiting*, 70 Me. 445; *Fahey v. Mottu*, 67 Md. 250; *Com. v. Fay*, 126 Mass. 235; *Piper v. Pearson*, 2 Gray (Mass.) 120, 61 A. D. 438; *Gadsby v. Stimer*, 79 Mich. 260; *Spear v. Carter*, 1 Mich. 19, 48 A. D. 688; *Victor Mill & Min. Co. v. Justice Ct.*, 18 Nev. 21; *McDonald v. Prescott*, 2 Nev. 109, 90 A. D. 517. *Contra*, *Heck v. Martin*, 75 Tex. 469, 16 A. S. R. 915; *Williams v. Ball*, 51 Tex. 603, 36 A. R. 730; *Wright v. Hazen*, 24 Vt. 143. And see *Fox v. Hoyt*, 12 Conn. 491, 31 A. D. 760; *Stevens v. Mangum*, 27 Miss. 481; *Bernhardt v. Brown*, 118 N. C. 700, 36 L. R. A. 402.

If an entry of judgment by a justice of the peace is capable of two constructions, the judgment being within his jurisdiction upon one construction, and beyond his jurisdiction upon the other, the court will presume that he acted rightfully. *Bumpus v. Fisher*, 21 Tex. 561.

<sup>64</sup> *Galpin v. Page*, 18 Wall. (U. S.) 350; *Tolmie's Lessee v. Thompson*, 3 Cranch, C. C. 123, Fed. Cas. No. 14,080; *Gunn v. Howell*, 27 Ala. 663, 62 A. D. 785; *Foster v. Glazener*, 27 Ala. 391; *Shivers v. Wilson*, 5 Har. & J. (Md.) 130, 9 A. D. 497; *Ullman v. Lion*, 8 Minn. 381, 83 A. D. 783; *Carleton v. Wash. Ins. Co.*, 35 N. H. 162, 167; *Warren v. Union Bank*, 157 N. Y. 259, 43 L. R. A. 256; *Furgeson v. Jones*, 17 Or. 204, 11 A. S. R. 808 (semble); *Northcut v. Lemery*, 8 Or. 316. See page 89, *supra*, as to tax proceedings.

This is true in some states, where the statutory powers are exercised ministerially, not judicially, and only then. *Brown v. Wheelock*, 75 Tex. 385; *Pulaski County v. Stuart*, 28 Grat. (Va.) 872.

The fact that the statute has regulated the mode of procedure does not convert the proceeding into one of special statutory character, if the proceeding is one which the courts have ever entertained either at law or in equity in the exercise of their superior jurisdiction. *Bush v. Hanson*, 70 Ill. 480; *Ames v. Williams*, 72 Miss. 760.

courts passed in the exercise of special statutory powers,<sup>65</sup> as where, for example, the court orders a sale of a decedent's real estate.<sup>66</sup>

The presumption of jurisdiction applies in favor of the courts of a sister state,<sup>67</sup> as well as in favor of domestic judgments, and also in favor of colonial and foreign courts;<sup>68</sup>

<sup>65</sup> *Sears v. Terry*, 26 Conn. 273; *Overseers of the Poor v. Gullifer*, 49 Me. 360, 77 A. D. 265; *Holden v. Scanlin*, 30 Vt. 177.

<sup>66</sup> *Goodwin v. Sims*, 86 Ala. 102, 11 A. S. R. 21; *Wilson v. Holt*, 83 Ala. 528, 3 A. S. R. 768; *Root v. McFerrin*, 37 Miss. 17, 75 A. D. 49; *Martin v. Williams*, 42 Miss. 210, 97 A. D. 456; *Strouse v. Drennan*, 41 Mo. 289.

<sup>67</sup> ALABAMA: *Hassell v. Hamilton*, 33 Ala. 280, 283.

ARKANSAS: *Nunn v. Sturges*, 22 Ark. 389.

COLORADO: *Bruckman v. Taussig*, 7 Colo. 561.

ILLINOIS: *Horton v. Critchfield*, 18 Ill. 133, 65 A. D. 701.

INDIANA: *Bailey v. Martin*, 119 Ind. 103.

IOWA: *Coughran v. Gilman*, 81 Iowa, 442.

KENTUCKY: *Scott v. Coleman*, 5 Litt. 349, 15 A. D. 71.

LOUISIANA: *Graydon v. Justus*, 24 La. Ann. 222.

MASSACHUSETTS: *McMahon v. Eagle L. Ass'n*, 169 Mass. 539, 61 A. S. R. 306; *Buffum v. Stimpson*, 5 Allen, 591, 81 A. D. 767; *Van Norman v. Gordon*, 172 Mass. 576, 70 A. S. R. 304.

MICHIGAN: *Wilcox v. Kassick*, 2 Mich. 165.

MISSOURI: *Robertson v. Staed*, 135 Mo. 135, 58 A. S. R. 569, 575.

NEW HAMPSHIRE: *Rogers v. Odell*, 39 N. H. 452.

NEW YORK: *Pringle v. Woolworth*, 90 N. Y. 502; *Shumway v. Stillman*, 4 Cow. 292, 15 A. D. 374.

PENNSYLVANIA: *Mink v. Shaffer*, 124 Pa. 280.

SOUTH CAROLINA: *Coskery v. Wood*, 52 S. C. 516.

TEXAS: *Reid v. Boyd*, 13 Tex. 241, 65 A. D. 61; *Harper v. Nichol*, 13 Tex. 151.

WASHINGTON: *Ritchie v. Carpenter*, 2 Wash. 512, 26 A. S. R. 877.

WEST VIRGINIA: *Stewart v. Stewart*, 27 W. Va. 167.

And see *Butcher v. Brownsville Bank*, 2 Kan. 70, 83 A. D. 446; *Kunze v. Kunze*, 94 Wis. 54, 59 A. S. R. 857. See, however, *Ashley v. Laird*, 14 Ind. 222, 77 A. D. 67; *Hockaday v. Skeggs*, 18 La. Ann. 681; *Pelton v. Platner*, 13 Ohio, 209, 42 A. D. 197.

This presumption does not arise in favor of judgments of foreign courts of inferior jurisdiction. *Mills v. Stewart*, 12 Ala. 90; *Grant v. Bledsoe*, 20 Tex. 456. Nor does it apply where the jurisdiction, if it ex-

and as to these, the presumption applies in favor of the power to act, as well as in favor of the existence of the jurisdictional fact calling that power into operation.<sup>69</sup>

In the nature of the case, this presumption arises only when the facts relating to jurisdiction do not appear of record, since, if the facts appear, there is no room for a presumption.<sup>70</sup> Accordingly, if the record affirmatively shows that the court did not acquire jurisdiction, the presumption does not obtain, and the judgment is void.<sup>71</sup> And if the record shows that cer-

isted, must have been conferred on the foreign court by statute. *Kelley v. Kelley*, 161 Mass. 111, 42 A. S. R. 389; *Com. v. Blood*, 97 Mass. 538. Nor where it appears from the record that the defendant was a nonresident, and it does not appear affirmatively that service of process was made upon him in that state. *Rand v. Hanson*, 154 Mass. 87, 26 A. S. R. 210.

The presumption is that a foreign court of record is a court of superior jurisdiction. *Van Norman v. Gordon*, 172 Mass. 576, 70 A. S. R. 304; *Ritchie v. Carpenter*, 2 Wash. 512, 26 A. S. R. 877; *Stewart v. Stewart*, 27 W. Va. 167. A circuit court of a sister state is presumed to be one of superior jurisdiction. *Nicholas v. Farwell*, 24 Neb. 180.

Jurisdiction, once acquired, is presumed to have continued until final judgment. *Lockhart v. Locke*, 42 Ark. 17.

<sup>69</sup> *Brenan's Case*, 10 Q. B. 492; *Robertson v. Struth*, 5 Q. B. 941; *Snell v. Faussatt*, 1 Wash. C. C. 271, Fed. Cas. No. 13,138; *Bruckman v. Taussig*, 7 Colo. 561; *McNair v. Hunt*, 5 Mo. 301.

<sup>70</sup> *Van Matre v. Sankey*, 148 Ill. 536, 39 A. S. R. 196; *Dodge v. Coffin*, 15 Kan. 277; *Coskery v. Wood*, 52 S. C. 516. See, also, *Tremblay v. Aetna L. Ins. Co.*, 97 Me. 547, 94 A. S. R. 521; *Van Norman v. Gordon*, 172 Mass. 576, 70 A. S. R. 304. *Contra*, *Colt v. Haven*, 30 Conn. 190, 79 A. D. 244 (semble); *Robertson v. Staed*, 135 Mo. 135, 58 A. S. R. 569.

<sup>71</sup> *Eichhoff's Estate*, 101 Cal. 600.

<sup>72</sup> *Newman v. Crowls*, 23 U. S. App. 89; *Arroyo D. & W. Co. v. Superior Ct.*, 92 Cal. 47, 27 A. S. R. 91; *Whitwell v. Barbier*, 7 Cal. 54; *Frybarger v. McMillen*, 15 Colo. 349; *Colt v. Haven*, 30 Conn. 190, 79 A. D. 244; *Swearengen v. Gulick*, 67 Ill. 208; *Cox v. Matthews*, 17 Ind. 367; *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453, 38 A. D. 164; *Spillman v. Williams*, 91 N. C. 483; *Northcut v. Lemery*, 8 Or. 316; *Furgeson v. Jones*, 17 Or. 204, 11 A. S. R. 808; *Wall v. Wall*, 123 Pa. 545, 10 A. S. R. 549; *Withers v. Patterson*, 27 Tex. 491, 86 A. D. 643; *Wash. A. & G. R. Co. v. A. & W. R. Co.*, 19 Grat. (Va.) 592, 100 A. D. 710.

tain steps were taken with reference to a jurisdictional fact, and these are not sufficient to show jurisdiction, it will not be presumed, in favor of the judgment, that other or further steps were taken.<sup>72</sup>

The presumption of the existence of jurisdictional facts arises only in cases where the judgment is attacked collaterally or indirectly,—that is, in a proceeding other than that in which the judgment is rendered.<sup>73</sup>

The presumption is more readily indulged, it seems, after long lapse of time;<sup>74</sup> and it arises as well where the record is

<sup>72</sup> Galpin v. Page, 18 Wall. (U. S.) 350; Settlemier v. Sullivan, 97 U. S. 444; Latta v. Tutton, 122 Cal. 279, 68 A. S. R. 30; Hahn v. Kelly, 34 Cal. 391, 94 A. D. 742; Hobby v. Bunch, 83 Ga. 1, 20 A. S. R. 301; Clark v. Thompson, 47 Ill. 25, 95 A. D. 457; Swearengen v. Gullick, 67 Ill. 208; Hathaway v. Clark, 5 Pick. (Mass.) 490; Barber v. Morris, 37 Minn. 194, 5 A. S. R. 836; Godfrey v. Valentine, 39 Minn. 336, 12 A. S. R. 657; Hering v. Chambers, 103 Pa. 172, 175.

If, however, the record recites the existence of a certain jurisdictional fact, as of service of process, either personally or by publication, the fact that papers in the cause relating to the jurisdictional fact, but not properly a part of the record, such, for instance, as the affidavit of service, are defective, does not overcome the recital, if it is possible that the defect might have been cured by other or further proceedings. Reedy v. Camfield, 159 Ill. 254; Moore v. Nell, 39 Ill. 256, 89 A. D. 303; Sears v. Sears, 95 Ky. 173, 44 A. S. R. 213; Bustard v. Gates, 4 Dana (Ky.) 429; Maples v. Mackey, 89 N. Y. 146; Callen v. Ellison, 13 Ohio St. 446, 82 A. D. 448; Hardy v. Beaty, 84 Tex. 562, 31 A. S. R. 80; In re Amy's Estate, 12 Utah, 278; State v. Superior Ct., 19 Wash. 128, 67 A. S. R. 724; Rogers v. Miller, 13 Wash. 82, 52 A. S. R. 20.

<sup>73</sup> Eichhoff v. Eichhoff, 107 Cal. 42, 48 A. S. R. 110; Sichler v. Look, 93 Cal. 600; Swearengen v. Gullick, 67 Ill. 208. And see Haupt v. Simington, 27 Mont. 480, 94 A. S. R. 839.

The presumption does not avail as an absolute conclusion against a party offering, in an independent proceeding, to show facts impeaching the court's jurisdiction. Mullins v. Rieger, 169 Mo. 521, 92 A. S. R. 651.

<sup>74</sup> Florentine v. Barton, 2 Wall. (U. S.) 210; Sprague v. Litherberry, 4 McLean, 442, Fed. Cas. No. 13,251; Nickrans v. Wilk, 161 Ill. 76; Bustard v. Gates, 4 Dana (Ky.) 429.

lost and proved by secondary evidence as where the record itself is introduced.<sup>75</sup>

(b) **Regularity of subsequent proceedings.** Once the court has gained jurisdiction of the subject-matter and of the parties, the presumption of regularity attaches to every subsequent act and proceeding in the case up to and including the final judgment or decree, unless the record shows the contrary.<sup>76</sup> This presumption, unlike the presumption of jurisdiction, applies as well to courts of inferior jurisdiction as to

<sup>75</sup> *Warfield's Will*, 22 Cal. 51, 83 A. D. 49.

<sup>76</sup> *Gosset v. Howard*, 10 Q. B. 411, 459; *Voorhees v. Jackson*, 10 Pet. (U. S.) 449; *Lathrop v. Stuart*, 5 McLean, 167, Fed. Cas. No. 8,113; *Drake v. Duvenick*, 45 Cal. 455; *Tucker v. Harris*, 13 Ga. 1, 58 A. D. 488; *Cannon v. Cooper*, 39 Miss. 784, 80 A. D. 101; *McDonald v. Frost*, 99 Mo. 44; *Morrison v. Woolson*, 29 N. H. 510; *Carter v. Jones*, 40 N. C. (5 Ired. Eq.) 196, 49 A. D. 425; *Lyon v. McDonald*, 78 Tex. 71, 9 L. R. A. 295; *Merritt v. Baldwin*, 6 Wis. 439.

Proper filing of affidavit in attachment presumed. *Beebe v. Morrell*, 76 Mich. 114, 15 A. S. R. 288. Regularity of selection of grand jury presumed. *Conner v. State*, 4 Yerg. (Tenn.) 137, 26 A. D. 217. Qualification of jurors presumed. *Leonard v. Sparks*, 117 Mo. 103, 38 A. S. R. 646. Entry of plaintiff's death presumed a mistake. *Falkner v. Christian's Adm'r*, 51 Ala. 495. Regularity of depositions presumed. *Goodwin v. Sims*, 86 Ala. 102, 11 A. S. R. 21. Examination of title by court before decree of partition presumed. *Cummisky v. Cummisky*, 109 Pa. 1. Evidence presumed to support finding. *Hilton v. Bachman*, 24 Neb. 490. Proper entry of judgment presumed. *Sliger v. Pittsburg Bank*, 16 How. (U. S.) 571; *Bunker v. Rand*, 19 Wis. 253. Regularity of judgment by default presumed. *Fogg v. Gibbs*, 8 Baxt. (Tenn.) 464. Proper issuance of execution presumed. *Sachse v. Clingingsmith*, 97 Mo. 406. Regularity of supplementary proceedings presumed. *Wright v. Nostrand*, 94 N. Y. 31. Receipt and confirmation of report of jury finding lunacy presumed. *Sims v. Sims*, 121 N. C. 297, 40 L. R. A. 737. Absence of attesting witness to will presumed to have been accounted for. *Brown v. Wood*, 17 Mass. 68. Notice of audit of claims against estate presumed. *Lex's Appeal*, 97 Pa. 289, 293. Notice of administrator's sale presumed. *Gibson v. Foster*, 2 La. Ann. 503. Notice of accounting by executor presumed. *Crew v. Pratt*, 119 Cal. 139.

The presumption applies to foreign proceedings resulting in a judgment. *Sanford v. Sanford*, 28 Conn. 6; *Dodge v. Coffin*, 15 Kan. 277.



courts whose jurisdiction is superior.<sup>77</sup> It applies even to the proceedings of arbitrators.<sup>78</sup>

Lapse of time adds to the strength of the presumption in favor of the regularity of judicial proceedings.<sup>79</sup>

The presumption applies only between the parties to the original suit or their privies, and not between strangers, or one party and a stranger.<sup>80</sup>

The presumptions here considered are those arising when the judgment is attacked collaterally. Analogous presumptions are oftentimes indulged in the same proceeding, it is true, as in proceedings for review, but these do not take the place of evidence, in the proper sense of the word, and they are therefore beyond the scope of the present discussion.

## § 28. Corporations.

(a) **Grant and acceptance of charter—Organization—Consolidation.** If an association has exercised corporate powers for a long period of time under a claim of corporate existence, the grant of a charter will be presumed, in the absence of evidence to the contrary.<sup>81</sup> Incorporation will not be presumed,

<sup>77</sup> *Cooper v. Sunderland*, 3 Iowa, 114, 66 A. D. 52; *Com. v. Bolkom*, 3 Pick. (Mass.) 281; *Stevens v. Mangum*, 27 Miss. 481; *Root v. McFerrin*, 37 Miss. 17, 75 A. D. 49; *Sherwood v. Baker*, 105 Mo. 472, 24 A. S. R. 399; *Den d. Vanderveere v. Gaston*, 25 N. J. Law, 615.

*Justices of the peace.* *Hopper v. Lucas*, 86 Ind. 43, 46; *Tharp v. Com.*, 3 Metc. (Ky.) 411.

The rule is the same in regard to inferior foreign courts. *State v. Hinchman*, 27 Pa. 479.

<sup>78</sup> *Strong v. Strong*, 9 Cush. (Mass.) 560; *Parsons v. Aldrich*, 6 N. H. 264; *Browning v. Wheeler*, 24 Wend. (N. Y.) 258, 35 A. D. 617; *Lamphire v. Cowan*, 39 Vt. 420; *Dolph v. Clemens*, 4 Wis. 181.

<sup>79</sup> *Wilson v. Holt*, 83 Ala. 528, 3 A. S. R. 768; *Wiggins v. Gillette*, 93 Ga. 20, 44 A. S. R. 123.

<sup>80</sup> *Seechrist v. Baskin*, 7 Watts & S. (Pa.) 403, 42 A. D. 251.

<sup>81</sup> 1 *Clark & M. Priv. Corp.* §§ 37(c), 63; *Kingston upon Hull v. Horner*, *Cowp.* 102; *U. S. v. Amedy*, 11 Wheat. (U. S.) 392; *Greene v. Den-*

however, from acts or from a mode of conducting business which might as well have been done or adopted by an unincorporated association as by a corporation.<sup>82</sup> As to whether the use of a name which ordinarily imports a corporate existence raises a presumption that the company using it is an incorporated association, the courts are in conflict.<sup>83</sup>

In quo warranto proceedings to oust persons from the exercise of corporate powers on the ground that they are not legally incorporated, the burden is on the defendants to show legal incorporation.<sup>84</sup> If ouster is sought because of an alleged surrender or forfeiture of corporate rights, however, the burden of proof is on the relator.<sup>85</sup>

In the absence of evidence to the contrary, the presumption

nis, 6 Conn. 293, 16 A. D. 58; *Jameson v. People*, 16 Ill. 257, 63 A. D. 304; *White v. State*, 69 Ind. 273; *Trott v. Warren*, 11 Me. 227; *Stockbridge v. West Stockbridge*, 12 Mass. 399; *Dillingham v. Snow*, 3 Mass. 276, 5 Mass. 547; *People v. Maynard*, 15 Mich. 463; *Bow v. Allentown*, 34 N. H. 351, 69 A. D. 489; *Sasser v. State*, 13 Ohio, 453; *Methodist Episcopal Soc. v. Lake*, 51 Vt. 353; *Ricketson v. Galligan*, 89 Wis. 394. *Contra*, *Griffin v. Clinton Line Ext. R. Co.*, 1 West. Law Month. 31, Fed. Cas. No. 5,816.

<sup>82</sup> 1 Clark & M. Priv. Corp. § 63; *Clark v. Jones*, 87 Ala. 474; *Greene v. Dennis*, 6 Conn. 293, 16 A. D. 58; *Duke v. Taylor*, 37 Fla. 64, 53 A. S. R. 232; *Alden v. St. Peter's Parish*, 158 Ill. 631, 30 L. R. A. 232; *Fredenburg v. Lyon Lake M. E. Church*, 37 Mich. 476; *Abbott v. Omaha S. & R. Co.*, 4 Neb. 416.

<sup>83</sup> 1 Clark & M. Priv. Corp. §§ 63, 92(c). *Pro*: *Stein v. Indianapolis Bldg. Loan Fund & Sav. Ass'n*, 18 Ind. 237, 81 Am. Dec. 353; *Williamsburg City F. Ins. Co. v. Frothingham*, 122 Mass. 391; *Stoutimore v. Clark*, 70 Mo. 471; *Platte Valley Bank v. Harding*, 1 Neb. 461. *Con*: *Briggs v. McCullough*, 36 Cal. 542, 550; *Duke v. Taylor*, 37 Fla. 64, 53 A. S. R. 232.

<sup>84</sup> 1 Clark & M. Priv. Corp. § 62; *People v. Lowden* (Cal.) 8 Pac. 66; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 353, 8 A. D. 243. And see *People v. R. R. & L. E. R. Co.*, 12 Mich. 389, 395.

<sup>85</sup> *North & S. Rolling Stock Co. v. People*, 147 Ill. 234, 24 L. R. A. 462; *State v. Haskell*, 14 Nev. 209; *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351.

is that the incorporators have accepted a charter granted to them, if it is beneficial to them.<sup>86</sup> Acceptance may also be presumed from organization under a general law,<sup>87</sup> or from user.<sup>88</sup>

If an association has assumed to organize as a corporation under a valid law, and has exercised corporate powers, it is presumed, in the absence of evidence on the subject, that all conditions precedent have been complied with in its organization, and that it has been legally incorporated.<sup>89</sup>

If a company sues as a corporation, and its incorporation is

<sup>86</sup> 1 Clark & M. Priv. Corp. § 66; *Newton v. Carbery*, 5 Cranch, C. C. 632, Fed. Cas. No. 10,190; *Bangor, O. & M. R. Co. v. Smith*, 47 Me. 34; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344; *San Antonio v. Jones*, 28 Tex. 19.

<sup>87</sup> 1 Clark & M. Priv. Corp. § 44(f); *Glymont I. & E. Co. v. Toler*, 80 Md. 278.

<sup>88</sup> 1 Clark & M. Priv. Corp. § 66; *Rex v. Amery*, 1 Term R. 575, 2 Term R. 515; *U. S. Bank v. Dandridge*, 12 Wheat. (U. S.) 64; *Talladega Ins. Co. v. Landers*, 43 Ala. 115; *Logan v. McAllister*, 2 Del. Ch. 176; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224, 33 A. D. 656; *Hammond v. Straus*, 53 Md. 1; *Russell v. McLellan*, 14 Pick. (Mass.) 63; *Sons of Temperance v. Brown*, 11 Minn. 356; *Perkins v. Sanders*, 56 Miss. 733; *Sumrall v. Sun Mut. Ins. Co.*, 40 Mo. 27; *Woods v. Banks*, 14 N. H. 101; *Taylor v. Newberne Com'rs*, 55 N. C. (2 Jones Eq.) 141, 64 A. D. 566; *McKay v. Beard*, 20 S. C. 156; *Gleaves v. Brick Church Turnpike Co.*, 1 Sneed (Tenn.) 491; *Manchester Bank v. Allen*, 11 Vt. 302.

<sup>89</sup> 1 Clark & M. Priv. Corp. § 67f; *U. S. Bank v. Lyman*, 1 Blatchf. 297, Fed. Cas. No. 924, affirmed 12 How. (U. S.) 225; *Duke v. Cahawba Nav. Co.*, 10 Ala. 82, 44 A. D. 472; *Memphis & St. F. Plank Road Co. v. Rives*, 21 Ark. 302; *Wood v. Wiley Const. Co.*, 56 Conn. 87; *Sweney v. Talcott*, 85 Iowa, 103; *Sword v. Wickersham*, 29 Kan. 746; *Hager's Town Turnpike Road Co. v. Creeger*, 5 Har. & J. (Md.) 122, 9 A. D. 495; *Packard v. O. C. R. Co.*, 168 Mass. 92; *Tar River Nav. Co. v. Neal*, 10 N. C. (3 Hawks) 520; *Ashtabula & N. L. R. Co. v. Smith*, 15 Ohio St. 328; *Nat. Mut. F. Ins. Co. v. Yeomans*, 8 R. I. 25, 86 A. D. 610; *Manchester Bank v. Allen*, 11 Vt. 302; *Puget Sound & C. R. Co. v. Ouellette*, 7 Wash. 265; *Attorney General v. C. & N. W. R. Co.*, 35 Wis. 425.

denied, the burden of proving corporate existence rests upon it.<sup>90</sup> So, if persons doing business under a company name are sued individually as partners, and they deny individual liability on the ground that they are incorporated, and that the liability was incurred by the corporation, the burden is on them to prove incorporation, or to show an estoppel on the plaintiff's part to deny incorporation.<sup>91</sup>

In the absence of evidence to the contrary, it is presumed that corporations, in consolidating under statutory authority, have complied with the requirements of the statute.<sup>92</sup>

**(b) Officers—Appointment—Regularity of acts.** Persons acting publicly as officers of a corporation are presumed to be rightfully in office, in the absence of evidence to the contrary,<sup>93</sup> and acceptance of a corporate office may also be pre-

<sup>90</sup> 1 Clark & M. Priv. Corp. § 62; *U. S. v. Amedy*, 11 Wheat. (U. S.) 392, 409 (semble); *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 A. D. 344; *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 52 A. S. R. 220; *Society v. Young*, 2 N. H. 310; *M. E. Union Church v. Pickett*, 19 N. Y. 482; *U. S. Bank v. Stearns*, 15 Wend. (N. Y.) 314; *Calkins v. State*, 18 Ohio St. 366, 98 A. D. 121; *Lord v. Bigelow*, 8 Vt. 445.

<sup>91</sup> 1 Clark & M. Priv. Corp. § 62; *Owen v. Shepard*, 19 U. S. App. 336, 59 Fed. 746; *Clark v. Jones*, 87 Ala. 474; *Williams v. Hewitt*, 47 La. Ann. 1076, 49 A. S. R. 394; *Abbott v. Omaha S. & R. Co.*, 4 Neb. 416.

The plaintiff must first make out a prima facie case of partnership, however. *Hallstead v. Curtis*, 143 Pa. 352, 13 L. R. A. 370; *Halstead's Appeal*, 157 Pa. 59, 22 L. R. A. 276.

<sup>92</sup> 1 Clark & M. Priv. Corp. § 350; *Lewis v. Clarendon*, 5 Dill. 329, Fed. Cas. No. 8,320; *Swartwout v. Mich. Air Line R. Co.*, 24 Mich. 390.

<sup>93</sup> 1 Clark & M. Priv. Corp. § 660; *U. S. Bank v. Dandridge*, 12 Wheat. (U. S.) 64, 70; *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 A. D. 344; *Susquehanna Bridge & B. Co. v. General Ins. Co.*, 3 Md. 305, 56 A. D. 740; *State v. Kupferle*, 44 Mo. 154, 100 A. D. 265; *Hilliard v. Goold*, 34 N. H. 230, 66 A. D. 765; *Lucky Queen Min. Co. v. Abraham*, 26 Or. 282.

Presumption of appointment of officers of municipal corporation, see § 24, *supra*.

Quo warranto against corporate officers, see note 8, *supra*.

sumed.<sup>94</sup> Proceedings of stockholders or directors are presumed regular, in the absence of evidence to the contrary, and accordingly when, acting under a by-law or charter provision, they remove an officer, the presumption is that they acted on sufficient grounds.<sup>95</sup>

If an act done by a corporate officer is within the apparent scope of his authority, the presumption is that the act was authorized by all due formalities, and that he performed it regularly.<sup>96</sup> This rule applies to directors. Accordingly, in the absence of evidence on the subject, when any action purports to have been the action of the directors, it is presumed that they acted at a lawful meeting, of which due and sufficient notice was given, that a quorum was present, that the meeting was properly conducted at a proper place, and that the act in question was the act of the majority.<sup>97</sup>

<sup>94</sup> 1 Clark & M. Priv. Corp. § 660; *Halpin v. Mut. Brew. Co.*, 20 App. Div. (N. Y.) 583.

<sup>95</sup> 1 Clark & M. Priv. Corp. § 666; *State v. Kupferle*, 44 Mo. 154, 100 A. D. 265.

This presumption applies in favor of proceedings for the expulsion of a member of a religious or social organization, as well as other proceedings. *Shannon v. Frost*, 3 B. Mon. (Ky.) 253, 258; *People v. St. George's Soc.*, 28 Mich. 261; *Harmon v. Dreher*, *Speer Eq. (S. C.)* 87. But it does not apply to proceedings for the forfeiture of a member's property rights. *People v. Detroit F. Dep't*, 31 Mich. 458; *People v. Erie County Medical Soc.*, 32 N. Y. 187.

<sup>96</sup> Where the common seal of a corporation is affixed to an instrument, and the signature of a proper officer is proved, the seal is prima facie evidence that it was attached by proper authority. *Thorington v. Gould*, 59 Ala. 461; *Canandarqua Academy v. McKechnie*, 90 N. Y. 618. And see *Mickey v. Stratton*, 5 Sawy. 475, Fed. Cas. No. 9,530; *Wood v. Whelen*, 93 Ill. 153.

<sup>97</sup> 1 Clark & M. Priv. Corp. §§ 647, 648(c), 649(f), 681.

CALIFORNIA: *Stockton Combined H. & A. Works v. Houser*, 109 Cal. 1.

CONNECTICUT: *Chase v. Tuttle*, 55 Conn. 455, 3 A. S. R. 64.

ILLINOIS: *Cushman v. Ill. Starch Co.*, 79 Ill. 281.

IOWA: *Hardin v. Iowa R. & C. Co.*, 78 Iowa, 726, 6 L. R. A. 52.

(c) **Powers.** When a question arises as to whether a particular act or contract is in excess of the powers of a corporation, and there might be circumstances under which it would be authorized, it is presumed to have been authorized, and the burden of showing the contrary rests on the party who sets up the want of power.<sup>98</sup> Thus, if a corporation authorized to hold real property under some circumstances or for some purposes purchases and takes a conveyance of property, it is presumed that it did so for an authorized purpose, until the contrary is shown.<sup>99</sup> So, whenever the circumstances may have been such

LOUISIANA: *Ross v. Crockett*, 14 La. Ann. 811; *Dunn v. New Orleans Bldg. Co.*, 8 La. 483.

MAINE: *Copp v. Lamb*, 12 Me. 312; *Brackett v. Persons Unknown*, 53 Me. 228.

MARYLAND: *Balle v. Calvert College Educational Soc.*, 47 Md. 117.

MASSACHUSETTS: *Sargent v. Webster*, 18 Metc. 497, 46 A. D. 743; *Wallace v. First Parish in Townsend*, 109 Mass. 263.

MICHIGAN: *Wells v. Rodgers*, 60 Mich. 525.

MINNESOTA: *Fletcher v. C., St. P., M. & O. R. Co.*, 67 Minn. 339.

MISSOURI: *Chouteau Ins. Co. v. Holmes' Adm'r*, 68 Mo. 601, 30 A. R. 807.

NEW HAMPSHIRE: *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 A. D. 203 (semble); *Cobleigh v. Young*, 15 N. H. 493.

NEW JERSEY: *Van Hook v. Somerville Mfg. Co.*, 5 N. J. Eq. 137.

NORTH CAROLINA: *Benbow v. Cook*, 115 N. C. 324, 44 A. S. R. 454.

UTAH: *Singer v. Salt Lake Copper Mfg. Co.*, 17 Utah, 143, 70 A. S. R. 773; *Leavitt v. Oxford & G. S. M. Co.*, 3 Utah, 265.

VERMONT: *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

See, however, *Stevens v. Taft*, 3 Gray (Mass.) 487.

<sup>98</sup> 1 Clark & M. Priv. Corp. §§ 128(c) (3), 174; *Scottish N. E. R. Co. v. Stewart*, 3 Macq. H. L. Cas. 382; *Ala. G. L. Ins. Co. v. Cent. A. & M. Ass'n*, 54 Ala. 73; *International B. & L. Ass'n v. Wall*, 153 Ind. 554; *West v. Averill Grocery Co.*, 109 Iowa, 488; *Harrison Wire Co. v. Moore*, 55 Mich. 610; *Downing v. Mt. Wash. Road Co.*, 40 N. H. 230; *Ellerman v. Chicago J. R. & U. S. Co.*, 49 N. J. Eq. 217; *De Groff v. American Linen Thread Co.*, 21 N. Y. 127; *Howard v. Boorman*, 17 Wis. 459.

<sup>99</sup> 1 Clark & M. Priv. Corp. § 143; *Stockton Sav. Bank v. Staples*, 98 Cal. 189; *Ky. Lumber Co. v. Green*, 87 Ky. 257; *University of Mich. v. Detroit Young Men's Soc.*, 12 Mich. 138; *Conn. Mut. L. Ins. Co. v. Smith*,

Hammon, Ev.—8.

as to authorize a conveyance, lease, mortgage, or pledge of its property by a corporation, it is presumed, in the absence of evidence to the contrary, that the conveyance was duly authorized.<sup>100</sup> And since corporations may acquire stock in other corporations for some purposes, it is presumed that the taking of stock in one corporation by another was *intra vires*, unless the contrary appears.<sup>101</sup>

This rule applies to foreign corporations. Accordingly, in the absence of evidence on the subject, the presumption is that a particular contract entered into by a foreign corporation, and on which an action is brought by or against it, is within the powers conferred on the company by its charter,<sup>102</sup> unless the power is one which does not usually belong to such corporations.<sup>103</sup>

### § 29. Marriage.

If it appears that a marriage has taken place in fact, a presumption arises that all due formalities were observed in en-

117 Mo. 261, 38 A. S. R. 656; *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 A. D. 347; *Mallett v. Simpson*, 94 N. C. 37, 55 A. R. 594.

In condemnation proceedings by a corporation, however, the burden is on it to show that it has a right to take property, and that the property in question is necessary for its use. *Alloway v. Nashville*, 88 Tenn. 510, 8 L. R. A. 123.

<sup>100</sup> 1 *Clark & M. Priv. Corp.* § 164; *McIntire v. Preston*, 10 Ill. 48, 48 A. D. 321; *Ashley Wire Co. v. Ill. Steel Co.*, 164 Ill. 149, 56 A. S. R. 187; *University of Mich. v. Detroit Young Men's Soc.*, 12 Mich. 138; *Wood v. Wellington*, 30 N. Y. 218.

<sup>101</sup> 1 *Clark & M. Priv. Corp.* § 195; *Evans v. Bailey*, 66 Cal. 112; *Ryan v. L., A. & N. R. Co.*, 21 Kan. 365; *In re Rochester, H. & L. R. Co.*, 110 N. Y. 119.

<sup>102</sup> 1 *Clark & M. Priv. Corp.* § 840; *Boulware v. Davis*, 90 Ala. 207; *New England Mut. L. Ins. Co. v. Hasbrook's Adm'x*, 32 Ind. 447; *McCluer v. M. & L. R.*, 13 Gray (Mass.) 124, 74 A. D. 624; *In re Rochester, H. & L. R. Co.*, 45 Hun (N. Y.) 126; *Yeaton v. Eagle O. & R. Co.*, 4 Wash. 183.

<sup>103</sup> *Frye v. Ill. Bank*, 10 Ill. 332.

tering into it.<sup>104</sup> Thus, it may be presumed that the parties had legal capacity to enter into the marriage relation,<sup>105</sup> that they consented thereto,<sup>106</sup> that a license was first procured,<sup>107</sup> and that the person officiating had authority to do so;<sup>108</sup> and a foreign marriage being shown, it is presumed to be in accord with the *lex loci*, so that the burden of showing the contrary is on the party asserting it.<sup>109</sup>

<sup>104</sup> *Sichel v. Lambert*, 15 C. B. (N. S.) 781; *Reg. v. Cradock*, 3 Fost. & F. 837; *Reg. v. Mainwaring*, 26 Law J. M. Cas. 10; *The Lauderdale Peerage*, 10 App. Cas. 692; *Cartwright v. McGown*, 121 Ill. 388, 2 A. S. R. 105; *Botts v. Botts*, 22 Ky. L. R. 212, 56 S. W. 961; *People v. Calder*, 30 Mich. 85; *U. S. v. De Amador*, 6 N. M. 173; *Thomas v. Thomas*, 124 Pa. 646; *Long, Dom. Rel.* 101. Presumption of marriage, see § 58, *infra*.

<sup>105</sup> *Harrod v. Harrod*, 1 Kay & J. 4; *Jones v. Gilbert*, 135 Ill. 27; *U. S. v. De Amador*, 6 N. M. 173.

A party to a marriage is presumed to have been competent, even though he appears once to have been insane. *Castor v. Davis*, 120 Ind. 231; *Ward v. Dulaney*, 23 Miss. 410.

The presumption of competency is indulged in favor of the marriage whose validity is immediately in question,—not against that marriage and in favor of a prior marriage between one of the spouses and a third person. *Patterson v. Gaines*, 6 How. (U. S.) 550; *U. S. v. Green*, 98 Fed. 63.

Presumption of death of former spouse of one of the parties to a marriage, see § 62(c), *infra*. Presumption of divorce of former spouse, see § 35, *infra*.

<sup>106</sup> *Hutchins v. Kimmell*, 31 Mich. 126, 18 A. R. 164, 167; *Fleming v. People*, 27 N. Y. 329.

If an infant marries, it is not presumed that his parent or guardian assented, as required by the English statute. *Rex v. James*, Russ. & R. 17; *Rex v. Butler*, Russ. & R. 61. *Contra*, *Harrison v. Southampton Corp.*, 21 Eng. Law & Eq. 343.

<sup>107</sup> *Piers v. Piers*, 2 H. L. Cas. 331.

The fact that a marriage license has been issued founds a presumption that all statutory requisites have been complied with. *Nofire v. U. S.*, 164 U. S. 657.

<sup>108</sup> *Pratt v. Pierce*, 36 Me. 448, 58 A. D. 753; *Hanon v. State*, 63 Md. 123; *Meggison v. Meggison*, 21 Or. 387, 14 L. R. A. 540. And see *Patterson v. Gaines*, 6 How. (U. S.) 550.

<sup>109</sup> *Rex v. Brampton*, 10 East, 282; *Blasini v. Blasini's Succession*, 30



### § 30. Contracts and conveyances.

(a) **Consideration.** In the absence of evidence to the contrary, the presumption is that a given contract is based on a sufficient consideration, and the burden of proving the contrary, either as a defense or as ground for affirmative relief, rests on the party who asserts it.<sup>110</sup> Thus, if a shipper seeks to avoid a limitation of liability in the contract of shipment as having been exacted without consideration, he has the burden of proving that fact.<sup>111</sup>

(b) **Execution.** The presumption is that the signature to a document is genuine,<sup>112</sup> unless its genuineness is made an is-

La. Ann. 1388, 1398; *Redgrave v. Redgrave*, 38 Md. 93; *Jackson v. Jackson*, 80 Md. 176; *Hynes v. McDermott*, 91 N. Y. 451, 456, 43 A. R. 677; *Lancot v. State*, 98 Wis. 136.

Though the *lex loci* requires a marriage to be entered into as a civil contract before a magistrate, and forbids, under penalty, the celebration of a religious ceremony in the absence of a civil contract, yet proof that a religious ceremony was performed does not, in a prosecution for bigamy, authorize a presumption that the civil ceremony had been performed. *Weinberg v. State*, 25 Wis. 370.

<sup>110</sup> *Treat v. Orono*, 26 Me. 217. Presumption of consideration for negotiable instruments and transfer thereof, see § 30(e), *infra*.

Consideration for a specialty is sometimes said to be presumed. *McCarty v. Beach*, 10 Cal. 461; *Northern Kan. Town Co. v. Oswald*, 18 Kan. 336; *Page v. Trufant*, 2 Mass. 159, 162, 3 A. D. 41; *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685, 23 A. D. 748; *Douglass v. Howland*, 24 Wend. (N. Y.) 35. At common law, this is merely a roundabout way of expressing the rule that a specialty requires no consideration, since, in the absence of statute, with few exceptions, a consideration is not, and never was, either actually or theoretically, an element of the specialty. *Hammon*, Cont. § 272. In many states this rule has been modified by statute, so that a seal is not conclusive, but merely *prima facie* evidence of a consideration.

<sup>111</sup> *Brown v. L. & N. R. Co.*, 36 Ill. App. 140; *McMillan v. Mich. So. & N. I. R.*, 16 Mich. 79, 93 A. D. 208; *Wehmann v. M., St. P. & S. S. M. R. Co.*, 58 Minn. 22, 29 (semble); *Schaller v. C. & N. W. R. Co.*, 97 Wis. 31. And see *St. Louis & S. F. R. Co. v. Hurst*, 67 Ark. 407; *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1, 24 A. S. R. 586.

<sup>112</sup> *Ponder v. Shumans*, 80 Ga. 505.

sue, in which case the burden of proof rests on the party claiming under the instrument.<sup>118</sup>

If a deed is signed and acknowledged, the execution is presumed to be regular;<sup>114</sup> and the same presumption is indulged where a deed has been duly acknowledged and recorded.<sup>115</sup>

Where an instrument cannot be produced, as where it is lost, it is presumed to have been in proper form,<sup>116-119</sup> and to have been executed with all due formality,<sup>120</sup> as that it bore a stamp, if it is of such a nature that the law required it to be stamped.<sup>121</sup> So, if an instrument bears the proper stamp, it is presumed that it was affixed at the proper time, and by the proper party.<sup>122</sup> And if a party's signature is proved, it is presumed that a seal was attached.<sup>123</sup> If a certified copy of a recorded deed bears a scroll with the word "Seal" written therein, the presumption is that the original was duly

<sup>118</sup> *Green v. Maloney*, 7 *Houst. (Del.)* 22; *Richardson v. Fellner*, 9 *Okl.* 513.

<sup>114</sup> *People v. Cogswell*, 113 *Cal.* 129, 35 *L. R. A.* 269.

<sup>115</sup> *Warren v. Jacksonville*, 15 *Ill.* 236, 58 *A. D.* 610, 615.

A patent which appears on its face to have been legally executed is presumed to have been executed by the proper officers. *Parkison v. Bracken*, 1 *Pin. (Wis.)* 174, 39 *A. D.* 296.

<sup>116-119</sup> *Burgess v. Vreeland*, 24 *N. J. Law*, 71, 59 *A. D.* 408.

<sup>120</sup> The fact that a purchase-money mortgage was executed with due formality raises a presumption that the deed of conveyance contemporaneously made was likewise duly executed. *Godfroy v. Disbrow*, *Walk. (Mich.)* 260.

<sup>121</sup> *Hart v. Hart*, 1 *Hare*, 1; *Rex v. Long Buckby*, 7 *East*, 45; *Marine Inv. Co. v. Havside*, *L. R.* 5 *H. L.* 624; *Thayer v. Barney*, 12 *Minn.* 502. And see *Collins v. Valteau*, 79 *Iowa*, 626; *Grand v. Cox*, 24 *La. Ann.* 462.

This presumption does not arise if, when the instrument was last seen, it bore no stamp. *Arbon v. Fussell*, 9 *Jur. N. S. (pt. 1)* 753; *Marine Inv. Co. v. Havside*, *L. R.* 5 *H. L.* 624.

<sup>122</sup> *Iowa & M. R. Co. v. Perkins*, 28 *Iowa*, 281. And see *Myers v. McGraw*, 5 *W. Va.* 30.

<sup>123</sup> *Grellier v. Neale, Peake*, 146.

sealed;<sup>124</sup> and a recital in an acknowledgment of a recorded instrument of the attaching of a seal to it by the officer taking it raises a presumption that the seal was attached, even though the record does not show a seal.<sup>125</sup>

It is presumed that the instrument was executed before the subscribing witnesses signed.<sup>126</sup>

An instrument is presumed to have been executed on the day of its date. In other words, the date is presumed to be correct.<sup>127</sup> This presumption may, however, be rebutted.<sup>128</sup>

<sup>124</sup> *Deininger v. McConnel*, 41 Ill. 227. And see *Hammond v. Gordon*, 93 Mo. 223.

<sup>125</sup> *Summer v. Mitchell*, 29 Fla. 179, 30 A. S. R. 106.

<sup>126</sup> *Hughes v. Debnam*, 53 N. C. (8 Jones) 127; *Pringle v. Dunn*, 37 Wis. 449; *Allen v. Griffin*, 69 Wis. 529.

<sup>127</sup> *Sinclair v. Baggaley*, 4 Mees. & W. 312; *Abrams v. Pomeroy*, 13 Ill. 133; *Meldrum v. Clark*, *Morris* (Iowa) 130; *Toebe v. Williams*, 80 Ky. 661; *Williams v. Woods*, 16 Md. 220. And see *Wyckoff v. Remsen*, 11 Paige (N. Y.) 564; *Doe d. Newlin v. Osborne*, 49 N. C. (4 Jones) 157, 67 A. D. 269. But see *Butler v. Mountgarret*, 7 H. L. Cas. 633, 646.

*Deed.* *Fowler v. Merrill*, 11 How. (U. S.) 375, 393; *Merrill v. Dawson*, *Hempst.* 563, *Fed. Cas. No.* 9,469; *Briggs v. Fleming*, 112 Ind. 313; *Savery v. Browning*, 18 Iowa, 246; *Smith v. Porter*, 10 Gray (Mass.) 66; *Costigan v. Gould*, 5 Denio (N. Y.) 290; *Cover v. Manaway*, 115 Pa. 338, 2 A. S. R. 552. Presumption of date of delivery, see page 122, *infra*. The presumption arises even where the deed appears to have been acknowledged on a later day. *McFarlane v. Loudon*, 99 Wis. 620, 67 A. S. R. 883. See, also, note 137, *infra*. If two deeds are dated and acknowledged on the same day, and one is recorded before the other, the burden of proving that the one last recorded was the first made rests on the party asserting it. *Woodward v. Brown*, 119 Cal. 283, 63 A. S. R. 108.

*Legal process.* *Bunker v. Shed*, 8 Metc. (Mass.) 150; *Day v. Lamb*, 7 Vt. 426.

*Letter.* *Potez v. Glassop*, 2 Exch. 191; *Houliston v. Smyth*, 2 Car. & P. 22, 24 (semble); *Pullen v. Hutchinson*, 25 Me. 249. Date as evidence of fact and time of sending of letter, see note, 20, *supra*.

*Negotiable instrument.* *Anderson v. Weston*, 6 Bing. N. C. 296; *Kniseley v. Sampson*, 100 Ill. 573; *Pullen v. Hutchinson*, 25 Me. 249; *Claridge v. Klett*, 15 Pa. 255.

If several instruments relating to one transaction bear the same date, the presumption is that they were executed in the order of time necessary to give them legal effect, according to the intention of the parties.<sup>129</sup>

An instrument is presumed to have been executed at the place where it bears date.<sup>130</sup>

(c) **Delivery.** If an instrument regular on its face is found in the hands of the person whom it is apparently designed to benefit, the presumption is that it was duly delivered.<sup>131</sup> This

*Assignment or indorsement of negotiable instrument.* Byrd v. Tucker, 3 Ark. 451; Meadows v. Cozart, 76 N. C. 450. The indorsement of a negotiable instrument payable on demand is presumed to have been made on the day of its execution. Leonard v. Olson, 99 Iowa, 162, 61 A. S. R. 230. See Anderson v. Weston, 6 Bing. N. C. 296.

*Receipt.* Malpas v. Clements, 19 Law J. Q. B. 435; Livingston v. Arnoux, 56 N. Y. 507, 519; Caldwell v. Gamble, 4 Watts (Pa.) 292.

There are some exceptions to the rule. Houllston v. Smyth, 2 Car. & P. 22, 24; Hoare v. Coryton, 4 Taunt. 560; Wright v. Lainson, 2 Mees. & W. 739; Anderson v. Weston, 6 Bing. N. C. 296, 302. And it has been held that the presumption will not be applied against one who is neither a party nor a privy to the instrument in question. Baker v. Blackburn, 5 Ala. 417.

<sup>129</sup> Abrams v. Pomeroy, 13 Ill. 133; Scobey v. Walker, 114 Ind. 254; Smith v. Porter, 10 Gray (Mass.) 66; Doe d. Newlin v. Osborne, 49 N. C. (4 Jones) 157, 67 A. D. 269.

<sup>129</sup> Taylor v. Horde, 1 Burrow, 60, 106; Dudley v. Cadwell, 19 Conn. 218; Ivy v. Yancey, 129 Mo. 501. See, also, page 122, *infra*.

In the absence of evidence to the contrary, it is presumed that a warehouseman's receipt, and a guaranty indorsed thereon, were executed at the same time. Underwood v. Hossack, 38 Ill. 208.

<sup>130</sup> Taylor v. Snyder, 3 Denio (N. Y.) 145, 45 A. D. 457.

If nothing appears to the contrary, the presumption is that a contract was made in the state where it is sued on. Baltimore, O. & C. R. Co. v. Scholes, 14 Ind. App. 524, 56 A. S. R. 307. And it is presumed that an acknowledgment was taken within the territorial limits of the officer's jurisdiction. People v. Snyder, 41 N. Y. 397.

<sup>131</sup> Boorman v. American Exp. Co., 21 Wis. 152. See Jones v. N. Y. L. Ins. Co., 168 Mass. 245.

It has been held that this presumption cannot be indulged where

presumption applies in favor of the delivery of deeds of real estate.<sup>132</sup>

In the case of a conveyance of real property, it is said that, if the grantor causes the deed to be recorded, this amounts,

execution of the instrument, which, of course, includes delivery, is put in issue by the pleadings. *Wilbur v. Stoepel*, 82 Mich. 344, 21 A. S. R. 568, 575. This case seems to misconceive the office of an evidentiary presumption. Such a presumption may consistently operate against the party having the burden of proof. See §§ 4, 16(c), 17(b), 21, *supra*.

Possession of a negotiable instrument payable to bearer, or a person's possession of an instrument payable to himself, raises a presumption of its proper delivery. *Curtis v. Rickards*, 1 Man. & G. 46; *Garrigus v. Home Frontier & F. M. Soc.*, 3 Ind. App. 91, 50 A. S. R. 262. Possession as evidence of ownership, see § 89(a), *infra*.

If a negotiable instrument executed by several persons is intrusted by all to one of the makers, the presumption is that he has authority to deliver it to the payee. *Carter v. Moulton*, 51 Kan. 9, 37 A. S. R. 259.

It has been held that, if the signature of a party is proved, it may be presumed that the deed was delivered. *Grellier v. Neale*, Peake, 146. And see *Hall v. Bainbridge*, 12 Q. B. 699; *Powers v. Russell*, 13 Pick. (Mass.) 69; *Diehl v. Emig*, 65 Pa. 320.

<sup>132</sup> *Lewis v. Watson*, 98 Ala. 479, 39 A. S. R. 82; *Ward v. Dougherty*, 75 Cal. 240, 7 A. S. R. 151; *Campbell v. Carruth*, 32 Fla. 264; *Griffin v. Griffin*, 125 Ill. 430; *Blair v. Howell*, 68 Iowa, 619; *Rohr v. Alexander*, 57 Kan. 381; *Ward v. Lewis*, 4 Pick. (Mass.) 518, 520; *Windom v. Schuppel*, 39 Minn. 35; *Boody v. Davis*, 20 N. H. 140, 51 A. D. 210; *Strough v. Wilder*, 119 N. Y. 530, 7 L. R. A. 555; *Devereux v. McMahon*, 108 N. C. 134, 12 L. R. A. 205; *Flint v. Phipps*, 16 Or. 437. And see *Powers v. Russell*, 13 Pick. (Mass.) 69, *Thayer*, Cas. Ev. 74.

Approval of a Spanish grant by the governor, and delivery of the title papers to the grantee, cannot be presumed from the grantee's possession of the papers. *Bergere v. U. S.*, 168 U. S. 66. Nor does the presumption apply where the deed was delivered after the death of the grantor by his administrator. *Tyler v. Hall*, 106 Mo. 313, 27 A. S. R. 337. See, also, note 133, *infra*.

A stronger presumption prevails in favor of the delivery of a deed of voluntary settlement than in case of a deed of bargain and sale. *Rodemeler v. Brown*, 169 Ill. 347, 61 A. S. R. 176; *Shields v. Bush*, 189 Ill. 534, 82 A. S. R. 474.

as against him, to prima facie evidence of delivery.<sup>133</sup> This is undoubtedly true if the grantee has previously agreed, either expressly or impliedly, to accept the deed;<sup>134</sup> but it is not the rule where the grantee has no knowledge of the execution of the deed,<sup>135</sup> unless the grant is obviously beneficial.

<sup>133</sup> *Laughlin v. Calumet & C. Canal & Dock Co.*, 65 Fed. 441; *Sheffield Land, I. & C. Co. v. Neill*, 87 Ala. 158; *Tenn. Coal, I. & R. Co. v. Wheeler*, 125 Ala. 538; *Parker v. Salmons*, 101 Ga. 160, 65 A. S. R. 291; *Warren v. Jacksonville*, 15 Ill. 236, 58 A. D. 610; *Glaze v. Three Rivers F. M. F. Ins. Co.*, 87 Mich. 349; *Burke v. Adams*, 80 Mo. 504, 50 A. R. 510; *Helms v. Austin*, 116 N. C. 751; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377; *Blight v. Schenck*, 10 Pa. 285, 51 A. D. 478; *Swiney v. Swiney*, 14 Lea (Tenn.) 316. *Contra*, *Barnes v. Barnes*, 161 Mass. 381.

This rule applies to sheriff's deeds. *Lewis v. Watson*, 98 Ala. 479, 39 A. S. R. 82.

The presumption is not overcome by declarations of the grantor that the deed was not delivered. *Helms v. Austin*, 116 N. C. 751; *Kern v. Howell*, 180 Pa. 315, 57 A. S. R. 641. Nor by the fact that the grantor has possession of the deed after recordation. *Estes v. German Nat. Bank*, 62 Ark. 7; *Colee v. Colee*, 122 Ind. 109, 17 A. S. R. 345; *Tobin v. Bass*, 85 Mo. 654, 55 A. R. 392; *Helms v. Austin*, 116 N. C. 751. See, however, *Powers v. Russell*, 13 Pick. (Mass.) 69.

The presumption does not arise where the grantee obtains possession of the deed, after the grantor's death, from his personal representative, and has it recorded. *Stone v. French*, 37 Kan. 145, 1 A. S. R. 237; *Hill v. McMichol*, 80 Me. 209; *Parrott v. Avery*, 159 Mass. 594, 38 A. S. R. 465. See, also, note 132, *supra*. If, however, a deed appears to have been recorded, and nothing more appears, the presumption is that it was caused to be recorded by the grantee, and this raises a presumption of delivery, in the absence of evidence to the contrary. *Sweetland v. Buell*, 164 N. Y. 541, 79 A. S. R. 676. See, however, *Chess v. Chess*, 1 Pen. & W. (Pa.) 32, 21 A. D. 350.

The presumption does not dispense with a recital of delivery required by statute as a prerequisite to recordation. *Rushin v. Shields*, 11 Ga. 636, 56 A. D. 436.

<sup>134</sup> *Walton v. Burton*, 107 Ill. 54; *O'Connor v. O'Connor*, 100 Iowa, 476, 480; *Steele v. Lowry*, 4 Ohio, 72, 19 A. D. 581; *Prignon v. Daussat*, 4 Wash. 199, 31 A. S. R. 914.

<sup>135</sup> *Younge v. Guilbeau*, 3 Wall. (U. S.) 636; *Parmelee v. Simpson*, 5 Wall. (U. S.) 81; *Rittmaster v. Brisbane*, 19 Colo. 371; *Sullivan v. Eddy*, 154 Ill. 199; *Deere v. Nelson*, 73 Iowa, 186; *Day v. Griffith*, 15

to him, in which case, at any rate if he is under contractual disability, his acceptance is presumed, in some jurisdictions, so that mere recordation of the deed by the grantor is a sufficient delivery.<sup>136</sup>

The presumption is, in the absence of evidence to the contrary, that a deed was delivered on the day of its date.<sup>137</sup>

If several deeds are executed in one transaction, the presumption is that they were delivered in such order of time as to make them effectual.<sup>138</sup>

These presumptions are rebuttable.<sup>139</sup>

Iowa, 104; *Alexander v. De Kermel*, 81 Ky. 345; *Hawkes v. Pike*, 105 Mass. 560, 7 A. R. 554; *Samson v. Thornton*, 3 Metc. (Mass.) 275, 37 A. D. 135; *Babbitt v. Bennett*, 68 Minn. 260; *Cravens v. Rossiter*, 116 Mo. 338, 38 A. S. R. 606; *Barns v. Hatch*, 3 N. H. 304, 14 A. D. 369.

Even though the grantee does not know of the deed at the time the grantor has it recorded, yet, if he assents to the grant upon learning of it, there is a valid delivery. *Weber v. Christen*, 121 Ill. 91, 2 A. S. R. 68; *Shields v. Bush*, 189 Ill. 534, 82 A. S. R. 474; *Lee v. Fletcher*, 46 Minn. 49, 12 L. R. A. 171; *Boody v. Davis*, 20 N. H. 140, 51 A. D. 210.

<sup>136</sup> See § 30 (d), *infra*, as to presumption of acceptance.

<sup>137</sup> *Ward v. Dougherty*, 75 Cal. 240, 7 A. S. R. 151 (statute); *Billings v. Stark*, 15 Fla. 297; *Briggs v. Fleming*, 112 Ind. 313; *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa, 286, 35 L. R. A. 63; *Shoptaw v. Ridgway's Adm'r*, 22 Ky. L. R. 1495, 60 S. W. 723; *Breckenridge v. Todd*, 3 T. B. Mon. (Ky.) 52, 16 A. D. 83; *Rhone v. Gale*, 12 Minn. 54; *People v. Snyder*, 41 N. Y. 397; *Purdy v. Coar*, 109 N. Y. 448, 4 A. S. R. 491; *Kendrick v. Dellinger*, 117 N. C. 491; *Hall v. Benner*, 1 Pen. & W. (Pa.) 402, 21 A. D. 394; *Wheeler v. Single*, 62 Wis. 380; *Dodge v. Hopkins*, 14 Wis. 630. And see *Williams v. Woods*, 16 Md. 220. Presumption of date of execution, see page 118, *supra*.

This is true, even though the instrument was subsequently acknowledged. *Lake Erie & W. R. Co. v. Whitham*, 155 Ill. 514, 46 A. S. R. 355; *Smiley v. Fries*, 104 Ill. 416; *Hardin v. Crate*, 78 Ill. 533; *Ford v. Gregory's Heirs*, 10 B. Mon. (Ky.) 175, 180; *People v. Snyder*, 41 N. Y. 397, 402; *Raines v. Walker*, 77 Va. 92. *Contra*, *Blanchard v. Tyler*, 12 Mich. 339, 86 A. D. 57. And see *Henderson v. Baltimore*, 8 Md. 352, 359. See, also, in this connection, *Clark v. Akers*, 16 Kan. 166; *Henry County v. Bradshaw*, 20 Iowa, 355; *Loomis v. Pingree*, 43 Me. 299; *Windom v. Schuppel*, 39 Minn. 35.

(d) **Acceptance.** The acceptance of an instrument by the party to be benefited may oftentimes be presumed, in the absence of evidence to the contrary.<sup>140</sup>

If a deed is beneficial to the grantee, and imposes no burdens upon him, a presumption arises, in the absence of evidence to the contrary, that he accepted it; and this is true, even though the deed was not delivered to him in person, but to a third person for his benefit.<sup>141</sup> In some jurisdictions this

The presumption does not apply to forged instruments. *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

<sup>138</sup> *Loomis v. Pingree*, 43 Me. 299. See, also, page 119, *supra*.

<sup>139</sup> *Wellborn v. Weaver*, 17 Ga. 267, 63 A. D. 235; *Union Mut. Ins. Co. v. Campbell*, 95 Ill. 267, 35 A. R. 166; *Price v. Hudson*, 125 Ill. 284; *Ford v. Gregory's Heirs*, 10 B. Mon. (Ky.) 175, 180; *Hendricks v. Rason*, 53 Mich. 575; *Eaton v. Trowbridge*, 38 Mich. 454; *Glaze v. Three Rivers F. M. F. Ins. Co.*, 87 Mich. 349; *Windom v. Schuppel*, 39 Minn. 35, 36; *Metcalf v. Brandon*, 60 Miss. 685; *Bullitt v. Taylor*, 34 Miss. 708, 69 A. D. 412; *Gilbert v. North American F. Ins. Co.*, 23 Wend. (N. Y.) 43, 35 A. D. 543; *Walsh's Adm'r v. Vt. Mut. F. Ins. Co.*, 54 Vt. 351; *Bruce v. Slemp*, 82 Va. 352; *Raines v. Walker*, 77 Va. 92.

<sup>140</sup> *Acceptance of officer's bond by corporation.* *U. S. Bank v. Dandridge*, 12 Wheat. (U. S.) 64, 70.

*Acceptance of subscription by corporation.* *Richelleu Hotel Co. v. International M. E. Co.*, 140 Ill. 248, 33 A. S. R. 234.

*Acceptance of gift of money.* *Olds v. Powell*, 7 Ala. 652, 42 A. D. 605; *Beaver v. Beaver*, 117 N. Y. 421, 15 A. S. R. 531.

*Assent of a widow to beneficial testamentary provision in lieu of dower.* *Merrill v. Emery*, 10 Pick. (Mass.) 507.

Where a promise is made by one person to another for the benefit of a third, the latter is presumed to accept it, in the absence of evidence to the contrary. *Rogers v. Gosnell*, 58 Mo. 589. This is true, especially if the third person is a minor. *Pruitt v. Pruitt*, 91 Ind. 595.

Acceptance of unknown terms and conditions of contract, see § 51, *infra*.

<sup>141</sup> *Hurst's Lessee v. McNeil*, 1 Wash. C. C. 70, Fed. Cas. No. 6,936; *Merrills v. Swift*, 18 Conn. 257, 46 A. D. 315; *Wellborn v. Weaver*, 17 Ga. 267, 63 A. D. 235; *Warren v. Jacksonville*, 15 Ill. 236, 58 A. D. 610; *Thompson v. Candor*, 69 Ill. 244; *Henry v. Anderson*, 77 Ind. 361; *Robinson v. Gould*, 26 Iowa, 89; *Holmes v. McDonald*, 119 Mich. 563, 75 A. S. R. 430; *Wall v. Wall*, 30 Miss. 91, 64 A. D. 147; *Boody v. Davis*, 20 N. H. 140, 51 A. D. 270; *Church v. Gilman*, 15 Wend. (N.



rule obtains, even where it appears that the grantee did not know of the deed, and, to dispel the presumption, it must be shown that the grantee actually refused to accept it.<sup>142</sup> In other jurisdictions, a contrary view is taken, and the presumption of acceptance is overthrown by evidence that the grantee did not know of the deed.<sup>143</sup> The presumption of acceptance applies with especial force to the case of a beneficial grant to a person non sui juris, and, under these circumstances, it seems everywhere to be immaterial whether the grantee knew of the deed or not.<sup>144</sup> As has been implied, however, this presumption is indulged only when the deed is

Y.) 656, 30 A. D. 82; *Crain v. Wright*, 114 N. Y. 307; *Arnegaard v. Arnegaard*, 7 N. D. 475, 41 L. R. A. 258; *Blight v. Schenck*, 10 Pa. 285, 51 A. D. 478.

This rule applies to trust deeds, including deeds for the benefit of creditors. *Governor v. Campbell*, 17 Ala. 566; *Hempstead v. Johnston*, 18 Ark. 123, 65 A. D. 458; *Eyrick v. Hetrick*, 13 Pa. 488; *Stone v. King*, 7 R. I. 358, 84 A. D. 557; *Bowden v. Parrish*, 86 Va. 67, 19 A. S. R. 873. See, however, *Benning v. Nelson*, 23 Ala. 801.

The presumption does not apply in favor of a stranger to the deed, where it is not shown that the grantee ever claimed under, or even heard of, the deed. *Hulick v. Scovil*, 9 Ill. 159.

<sup>142</sup> *Elsberry v. Boykin*, 65 Ala. 336; *Moore v. Giles*, 49 Conn. 570; *Wuester v. Folin*, 60 Kan. 334; *Renfro v. Harrison*, 10 Mo. 411, 415; *Peavey v. Tilton*, 18 N. H. 151, 45 A. D. 365; *Vreeland v. Vreeland*, 48 N. J. Eq. 56; *Lady Superior of C. N. of Montreal v. McNamara*, 3 Barb. Ch. (N. Y.) 375, 49 A. D. 184; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377; *Read v. Robinson*, 6 Watts & S. (Pa.) 329.

<sup>143</sup> *Hibberd v. Smith*, 67 Cal. 547, 56 A. R. 726; *Moore v. Flynn*, 135 Ill. 74; *Bell v. Farmers' Bank*, 11 Bush (Ky.) 34, 21 A. R. 205; *Watson v. Hillman*, 57 Mich. 607; *Tuttle v. Turner*, 28 Tex. 759.

<sup>144</sup> *Infants*. *Rhea v. Bagley*, 63 Ark. 374, 36 L. R. A. 86; *Weber v. Christen*, 121 Ill. 91, 2 A. S. R. 68; *Abbott v. Abbott*, 189 Ill. 488, 82 A. S. R. 470; *Colee v. Colee*, 122 Ind. 109, 17 A. S. R. 345; *Vaughan v. Godman*, 94 Ind. 191, 199; *Palmer v. Palmer*, 62 Iowa, 204; *Owings v. Tucker*, 90 Ky. 297; *Hall v. Hall*, 107 Mo. 101, 108; *Tate v. Tate*, 21 N. C. (1 Dev. & B. Eq.) 22; *Davis v. Garrett*, 91 Tenn. 147; *Bjmerland v. Eley*, 15 Wash. 101.

*Imbeciles*. *Eastham v. Powell*, 51 Ark. 530.

beneficial to the grantee. If it imposes any obligations upon him, the presumption does not arise.<sup>145</sup> The presumption of acceptance of a beneficial grant prevails in some states, even as against third persons who have acquired rights in the property after delivery of the deed, and before actual acceptance, if any;<sup>146</sup> as where, for instance, the grantor delivered the deed to the recording officer, and, before the grantee learned of it, a creditor of the grantor attached the property.

The presumption of acceptance is rebuttable.<sup>147</sup>

(e) **Negotiable instruments.** In an action by the payee against the maker of a negotiable instrument, it is presumed that the paper is based on a sufficient consideration, and the burden of proving the contrary rests, therefore, on the maker.<sup>148</sup> In an action brought against the maker by a sub-

*Lunatics.* *McCartney v. McCartney* (Tex. Civ. App.) 53 S. W. 388, judgment reversed 55 S. W. 310.

In some states this presumption applies to persons under disability alone. *McFadden v. Ross*, 14 Ind. App. 312; *Davis v. Davis*, 92 Iowa, 147.

<sup>145</sup> *St. Louis, I. M. & S. R. Co. v. Ruddell*, 53 Ark. 32; *Rittmaster v. Brisbane*, 19 Colo. 371; *Thompson v. Dearborn*, 107 Ill. 87; *Jefferson County Bldg. Ass'n v. Heil*, 81 Ky. 513; *Johnson v. Farley*, 45 N. H. 505; *Gifford v. Corrigan*, 105 N. Y. 223.

<sup>146</sup> *Doe d. Garnons v. Knight*, 5 Barn. & C. 671, 8 Dowl. & R. 348; *Jennings v. Jennings*, 104 Cal. 150; *Halluck v. Bush*, 2 Root (Conn.) 26, 1 A. D. 60; *Moore v. Giles*, 49 Conn. 570; *Vaughan v. Godman*, 103 Ind. 499; *Jones v. Swayze*, 42 N. J. Law, 279; *Nat. Bank v. Bonnell*, 46 App. Div. (N. Y.) 302; *Robbins v. Rascoe*, 120 N. C. 79, 38 L. R. A. 238. *Contra*, *Loubat v. Kipp*, 9 Fla. 60; *Woodbury v. Fisher*, 20 Ind. 387, 83 A. D. 325; *Samson v. Thornton*, 3 Metc. (Mass.) 275, 37 A. D. 135; *Kuh v. Garvin*, 125 Mo. 547; *Johnson v. Farley*, 45 N. H. 505; *Foster v. Beardsley Scythe Co.*, 47 Barb. (N. Y.) 505; *McEwen v. Bamberger*, 3 Lea (Tenn.) 576; *Denton v. Perry*, 5 Vt. 382; *Welch v. Sackett*, 12 Wis. 243. See *Hammon*, Cont. § 271.

<sup>147</sup> *Townson v. Tickell*, 3 Barn. & Ald. 31; *Treadwell v. Bulkley*, 4 Day (Conn.) 395, 4 A. D. 225; *Merrills v. Swift*, 18 Conn. 257, 46 A. D. 315; *Defreese v. Lake*, 109 Mich. 415, 32 L. R. A. 744; *Metcalfe v. Brandon*, 60 Miss. 685.

<sup>148</sup> *Perot v. Cooper*, 17 Colo. 80, 31 A. S. R. 258; *Topper v. Snow*, 20

sequent holder of the paper, the presumption is that the holder acquired the instrument before maturity, for value, and without notice of any defects therein, so that the burden of proving the contrary rests on the maker.<sup>149</sup>

Ill. 434; *Towsey v. Shook*, 3 Blackf. (Ind.) 267, 25 A. D. 108; *Cook v. Noble*, 4 Ind. 221; *Andrews v. Hayden's Adm'r*, 88 Ky. 455; *Jennison v. Stafford*, 1 Cush. (Mass.) 168, 48 A. D. 594; *Flint v. Phipps*, 16 Or. 437; *Hubble v. Fogartie*, 3 Rich. Law (S. C.) 413, 45 A. D. 775; *Herman v. Gunter*, 83 Tex. 66, 29 A. S. R. 632; *McKenzie v. Or. Imp. Co.*, 5 Wash. 409.

The rule has been held to apply to all promissory notes, whether negotiable or not. *Carnwright v. Gray*, 127 N. Y. 92, 24 A. S. R. 424. But it does not apply to notes made by insane persons. Here the burden of proving consideration rests on the holder. *Hosler v. Beard*, 54 Ohio St. 398, 56 A. S. R. 720.

This presumption of consideration is rebuttable as between maker and payee, and as between indorser and indorsee. *Williams v. Forbes*, 114 Ill. 167. But it is not rebuttable as against subsequent holders before maturity, for value, and without notice. *Goodman v. Harvey*, 4 Adol. & E. 870; *Murray v. Beckwith*, 81 Ill. 43; *Shenandoah Nat. Bank v. Marsh*, 89 Iowa, 273, 48 A. S. R. 381; *Hascall v. Whitmore*, 19 Me. 102, 36 A. D. 738; *Laffin & R. P. Co. v. Sinsheimer*, 48 Md. 411, 30 A. R. 472; *Howry v. Eppinger*, 34 Mich. 29; *Jennings v. Todd*, 118 Mo. 296, 40 A. S. R. 373; *Beltzhoover v. Blackstock*, 3 Watts (Pa.) 20, 27 A. D. 330; *Greneaux v. Wheeler*, 6 Tex. 515; 6 Current Law, 794.

<sup>149</sup> ENGLAND: *Millis v. Barber*, 1 Mees. & W. 425; *Middleton v. Bamed*, 4 Exch. 241.

UNITED STATES: *New Orleans C. & B. Co. v. Montgomery*, 95 U. S. 16; *Collins v. Gilbert*, 94 U. S. 753.

ALABAMA: *Lehman v. Tallassee Mfg. Co.*, 64 Ala. 567.

CALIFORNIA: *Sperry v. Spaulding*, 45 Cal. 544; *Poorman v. Mills*, 35 Cal. 118, 95 A. D. 90.

GEORGIA: *Dickerson v. Burke*, 25 Ga. 225.

ILLINOIS: *Mobley v. Ryan*, 14 Ill. 51, 56 A. D. 488; *Smith v. Nevlin*, 89 Ill. 193.

IOWA: *Union Nat. Bank v. Barber*, 56 Iowa, 559; *Shaw v. Jacobs*, 89 Iowa, 713, 48 A. S. R. 411.

KANSAS: *Ecton v. Harlan*, 20 Kan. 452; *First Nat. Bank v. Emmitt*, 52 Kan. 603.

LOUISIANA: *Taylor v. Bowles*, 28 La. Ann. 294.

MAINE: *Walker v. Davis*, 33 Me. 516.

In some states, however, it is held that the burden of proof as to consideration rests on the payee in the sense that, if the

**MARYLAND:** McDowell v. Goldsmith, 6 Md. 319, 61 A. D. 305; Hopkins v. Kent, 17 Md. 113.

**MASSACHUSETTS:** Ranger v. Cary, 1 Metc. 369.

**MICHIGAN:** Conley v. Winsor, 41 Mich. 253.

**MINNESOTA:** Cummings v. Thompson, 18 Minn. 246.

**MISSOURI:** Clark v. Schneider, 17 Mo. 295; Borgess Inv. Co. v. Vette, 142 Mo. 560, 64 A. S. R. 567.

**NEW JERSEY:** Duncan v. Gilbert, 29 N. J. Law, 521.

**NEW YORK:** James v. Chalmers, 6 N. Y. 209; Cruger v. Armstrong, 3 Johns. Cas. 5, 2 A. D. 126; Pinkerton v. Bailey, 8 Wend. 600; Vosburgh v. Diefendorf, 119 N. Y. 357, 16 A. S. R. 836.

**NORTH CAROLINA:** Tredwell v. Blount, 86 N. C. 33; Commercial Bank v. Burgwyn, 108 N. C. 62, 23 A. S. R. 49.

**OHIO:** Davis v. Bartlett, 12 Ohio St. 534, 80 A. D. 375.

**PENNSYLVANIA:** Beltzhoover v. Blackstock, 3 Watts, 20, 27 A. D. 330.

**SOUTH CAROLINA:** First Nat. Bank v. Anderson, 28 S. C. 143.

**TEXAS:** Blum v. Loggins, 53 Tex. 121.

**WISCONSIN:** Mason v. Noonan, 7 Wis. 609.

The presumption applies in favor of a subsequent holder of a note payable to bearer. Jones v. Westcott, 2 Brev. (S. C.) 166, 3 A. D. 704.

In Arkansas this presumption has been abrogated by statute, so far as it assumes a transfer before maturity. Clendenin v. Southerland, 31 Ark. 20. But production of note, with proof that the indorsement was made before maturity, raises a presumption that the indorsee took the note for value and without notice of equities. Tabor v. Merchants' Nat. Bank, 48 Ark. 454, 3 A. S. R. 241.

Proof of want or failure of consideration as between the parties to the note does not throw on the indorsee the burden of adducing evidence that he paid value for the paper before maturity, without notice of the defect. Fitch v. Jones, 5 El. & Bl. 238, 245; Galvin v. Meridian Nat. Bank, 129 Ind. 439; Clapp v. Cedar County, 5 Iowa, 15, 68 A. D. 678; Ellicott v. Martin, 6 Md. 509, 61 A. D. 327; New Hanover Bank v. Bridgers, 98 N. C. 67, 2 A. S. R. 317; Knight v. Pugh, 4 Watts & S. (Pa.) 445, 39 A. D. 99; Herman v. Gunter, 83 Tex. 66, 29 A. S. R. 632; Wilson v. Lazier, 11 Grat. (Va.) 477. Nor does proof that the maker has paid the amount to the original payee without notice of the transfer. Emanuel v. White, 34 Miss. 56, 69 A. D. 385. But the burden of showing notice of the transfer of a nonnegotiable instrument before payment

jury are not convinced by a preponderance of the evidence, viewed as a whole, that a consideration was given, they must find for the maker, but that, by producing the instrument, together with proof or admission of its execution, the payee makes a *prima facie* case which casts on the maker the burden of adducing evidence of want of consideration, and, in the absence of such evidence, entitles the payee to a verdict.<sup>150</sup> And the same rule is applied where the action is brought by an indorsee of the paper.<sup>151</sup>

If fraud or illegality is set up as a defense in an action on a negotiable instrument, the burden of proof as to that issue rests on the defendant.<sup>152</sup> If, however, the defendant adduces evidence of fraud or illegality, the presumption which otherwise prevails in favor of a subsequent holder of negotiable paper is dispelled, and the plaintiff is required to adduce evidence that he acquired the instrument before maturity, for value, and without notice of any defects therein.<sup>153</sup>

of it by the defendant to the payee lies on the plaintiff (*Johnston v. Allen*, 22 Fla. 224, 1 A. S. R. 180), since the presumption applies to negotiable instruments only (*Barrick v. Austin*, 21 Barb. [N. Y.] 241).

<sup>150</sup> *Huntington v. Shute*, 180 Mass. 371, 91 A. S. R. 309; *Delano v. Bartlett*, 6 Cush. (Mass.) 364; *Burnham v. Allen*, 1 Gray (Mass.) 496; *Perley v. Perley*, 144 Mass. 104.

<sup>151</sup> *Atlas Bank v. Doyle*, 9 R. I. 76, 98 A. D. 368, 11 A. R. 219.

<sup>152</sup> *Towsey v. Shook*, 3 Blackf. (Ind.) 267, 25 A. D. 108; *Emery v. Estes*, 31 Me. 155; *Pratt v. Langdon*, 97 Mass. 97, 93 A. D. 61; *Craig v. Proctor*, 6 R. I. 547.

The same is true where the instrument is alleged to have been lost or stolen. *Marion County Com'rs v. Clark*, 94 U. S. 278, 285.

<sup>153</sup> *Fraud*.

ENGLAND: *Fitch v. Jones*, 5 El. & Bl. 238, 245 (semble).

UNITED STATES: *Smith v. Sac County*, 11 Wall. 139.

ALABAMA: *Gilman v. N. O. & S. R. Co.*, 72 Ala. 566.

ARKANSAS: *Tabor v. Merchants' Nat. Bank*, 48 Ark. 454, 3 A. S. R. 241.

CALIFORNIA: *Sperry v. Spalding*, 45 Cal. 544.

GEORGIA: *Merchants' & P. Nat. Bank v. Masonic Hall*, 62 Ga. 271.

General evidence of want of notice is sufficient to take the case to the jury, however. If the plaintiff shows that he ac-

INDIANA: *Harbison v. Ind. Bank*, 28 Ind. 133, 92 A. D. 308; *Eichelberger v. Old Nat. Bank*, 103 Ind. 401.

IOWA: *Monroe Bank v. Anderson Bros. Min. & R. Co.*, 65 Iowa, 692, 701.

MARYLAND: *Williams v. Huntington*, 68 Md. 590, 6 A. S. R. 477; *Cover v. Myers*, 75 Md. 406, 32 A. S. R. 394.

MASSACHUSETTS: *Munroe v. Cooper*, 5 Pick. 412; *Bissell v. Morgan*, 11 Cush. 198.

MICHIGAN: *Conley v. Winsor*, 41 Mich. 253.

MINNESOTA: *Cummings v. Thompson*, 18 Minn. 246.

MISSOURI: *Johnson v. McMurry*, 72 Mo. 278; *Henry v. Sneed*, 99 Mo. 407, 17 A. S. R. 580.

MONTANA: *Thamling v. Duffey*, 14 Mont. 567, 43 A. S. R. 658.

NEBRASKA: *Haggland v. Stuart*, 29 Neb. 69.

NEW HAMPSHIRE: *Perkins v. Prout*, 47 N. H. 387, 93 A. D. 449.

NEW JERSEY: *Duncan v. Gilbert*, 29 N. J. Law, 521.

NEW YORK: *Joy v. Diefendorf*, 130 N. Y. 6, 27 A. S. R. 484; *Grant v. Walsh*, 145 N. Y. 502, 45 A. S. R. 626; *Vosburgh v. Diefendorf*, 119 N. Y. 357, 16 A. S. R. 836.

NORTH CAROLINA: *Commercial Bank v. Burgwyn*, 108 N. C. 62, 23 A. S. R. 49; *Pugh v. Grant*, 86 N. C. 39.

OHIO: *Davis v. Bartlett*, 12 Ohio St. 534, 80 A. D. 375; *McKesson v. Stanberry*, 3 Ohio St. 156.

PENNSYLVANIA: *Beltzhoover v. Blackstock*, 3 Watts. 20, 27 A. D. 330.

TEXAS: *Blum v. Loggins*, 53 Tex. 121.

VIRGINIA: *Vathir v. Zane*, 6 Grat. 246; *Wilson v. Lazier*, 11 Grat. 477.

The fraud which will thus shift the burden of adducing evidence must be a fraud against the defendant maker. *Kinney v. Kruse*, 28 Wis. 183.

If the plaintiff makes a prima facie case of bona fide purchase as part of his principal case, the defendant cannot show fraud in the execution of the instrument, without first adducing evidence destroying the prima facie validity of the plaintiff's case. *Drovers' Nat. Bank v. Blue*, 110 Mich. 31, 64 A. S. R. 327; *Reeve v. L., L. & G. Ins. Co.*, 39 Wis. 520.

*Illegality.* *Fitch v. Jones*, 5 El. & Bl. 238, 245 (semble); *Bailey v. Bidwell*, 13 Mees. & W. 73; *Bingham v. Stanley*, 2 Q. B. 117; *Pana v. Bowler*, 107 U. S. 529, 542; *Ruddell v. Landers*, 25 Ark. 238, 94 A. D.

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quired the instrument before maturity, for value, in due course of business, and no circumstances of suspicion appear, the presumption is that he took without notice of defects, and the burden of adducing evidence to the contrary rests on the defendant.<sup>154</sup>

If, in an action by a subsequent holder against the maker, it appears that the instrument has been altered, the burden of showing negligence on the part of the maker,<sup>155</sup> and a purchase before maturity, for value, without notice of the alteration,<sup>156</sup> rests on the holder.

719; *Rock Island Nat. Bank v. Nelson*, 41 Iowa, 563; *Emerson v. Burns*, 114 Mass. 348; *Little v. Mills*, 98 Mich. 423, 425; *McDonald v. Aufdengarten*, 41 Neb. 40; *Knox v. Williams*, 24 Neb. 630, 3 A. S. R. 220; *Garland v. Lane*, 46 N. H. 245. See, however, *Baxter v. Ellis*, 57 Me. 178. In some states, an indorsee cannot recover on a negotiable instrument affected in its inception with certain forms of illegality, even though he took it for value before maturity, and without notice of the taint. *Hammon, Cont.* § 254; *Ruddell v. Landers*, 25 Ark. 238, 94 A. D. 719 (semble).

*Ultra vires note*—*Burden on holder to show bona fide purchase.* *Thompson v. West*, 59 Neb. 677, 49 L. R. A. 337.

*Duress*—*Burden on holder to show bona fide purchase.* *Clark v. Pease*, 41 N. H. 414; *First Nat. Bank v. Green*, 43 N. Y. 298; *Beltzhoover v. Blackstock*, 3 Watts (Pa.) 20, 27 A. D. 330.

*Lost or stolen paper*—*Burden on holder to show bona fide purchase.* *Union Nat. Bank v. Barber*, 56 Iowa, 559; *Devlin v. Clark*, 31 Mo. 22; *Beltzhoover v. Blackstock*, 3 Watts (Pa.) 20, 27 A. D. 330. The rule is otherwise as to lost or stolen bank bills. Here the defendant must adduce evidence that the plaintiff is not a bona fide holder. *De la Chaumette v. Bank of England*, 2 Barn. & Adol. 385; *King v. Millsom*, 2 Camp. 5; *La. Bank v. U. S. Bank*, 9 Mart. (La.) 398; *Wyer v. Dorchester & M. Bank*, 11 Cush. (Mass.) 51, 59 A. D. 137.

The rule of the text is the same, whether the indorsement is general or special. *Morgan v. Yarborough*, 13 La. 74, 33 A. D. 553.

<sup>154</sup> *Lake v. Reed*, 29 Iowa, 258, 4 A. R. 209; *Market & F. Nat. Bank v. Sargent*, 85 Me. 349, 35 A. S. R. 376; *Swett v. Hooper*, 62 Me. 54; *Paton v. Colt*, 5 Mich. 505, 72 A. D. 58 (semble); *Henry v. Sneed*, 99 Mo. 407, 17 A. S. R. 580, 586 (semble); *Johnson v. McMurry*, 72 Mo. 278; *Davis v. Bartlett*, 12 Ohio St. 534, 80 A. D. 375.

<sup>155</sup> *Conger v. Crabtree*, 88 Iowa, 536, 45 A. S. R. 249.

If a member of a commercial partnership signs the firm name to a negotiable instrument, the presumption is, in the absence of evidence to the contrary, that he had authority to do so, and that he exercised the authority regularly,<sup>157</sup> unless the act appears to be without the scope of the firm business.<sup>158</sup>

(f) **Alteration of instrument.** If an instrument whose execution is proved or admitted bears no marks of alteration, the burden of adducing evidence that it has been tampered with rests on the party who alleges it.<sup>159</sup>

— **Presumption as to time of alteration.** If, however, the

<sup>156</sup> *Smith v. Eals*, 81 Iowa, 235, 25 A. S. R. 486.

<sup>157</sup> *Miller v. Hines*, 15 Ga. 197; *First Nat. Bank v. Carpenter*, 34 Iowa, 433; *Magill v. Merrie*, 5 B. Mon. (Ky.) 168, 170; *Waldo Bank v. Greely*, 16 Me. 419; *Thurston v. Lloyd*, 4 Md. 283; *Littell v. Fitch*, 11 Mich. 525; *Carrier v. Cameron*, 31 Mich. 373, 18 A. R. 192; *Vallett v. Parker*, 6 Wend. (N. Y.) 615. See, however, *Lucas v. Baldwin*, 97 Ind. 471.

This presumption does not arise unless the name signed by the individual partner, or some other circumstances, indicate a partnership concern. *Mfrs. Bank v. Winship*, 5 Pick. (Mass.) 11, 16 A. D. 369.

<sup>158</sup> *Pease v. Cole*, 53 Conn. 53, 55 A. R. 53; *Bryan v. Tooke*, 60 Ga. 437; *Eastman v. Cooper*, 15 Pick. (Mass.) 276, 26 A. D. 600.

<sup>159</sup> *U. S. v. Linn*, 1 How. (U. S.) 104; *Sturm v. Boker*, 150 U. S. 312, 340; *Montgomery v. Crossthwait*, 90 Ala. 553, 24 A. S. R. 832; *Chism v. Toomer*, 27 Ark. 108; *Harris v. Jacksonville Bank*, 22 Fla. 501, 1 A. S. R. 201; *Meikel v. State Sav. Inst.*, 36 Ind. 355; *Shroeder v. Webster*, 88 Iowa, 627; *Davis v. Jenney*, 1 Metc. (Mass.) 221; *McClintock v. State Bank*, 52 Neb. 130; *Riley v. Riley*, 9 N. D. 580; *Cosgrove v. Fanebust*, 10 S. D. 213; *Smith v. Parker* (Tenn. Ch. App.) 49 S. W. 285, 288; *Kan. Mut. L. Ins. Co. v. Coalson*, 22 Tex. Civ. App. 64, 67. And see *Davis v. Fuller*, 12 Vt. 178, 36 A. D. 334.

While the mere fact that words in a material part of a negotiable instrument are written over a place which has been rubbed or scraped as in making an erasure may not make a prima facie case of erasure, yet if the writing over the rough space appears to have been made with a different pen, different ink, or in a different hand, or if the words so written are either unproportionally crowded or extended to fit the rough space, a presumption of erasure arises. *Nagle's Estate*, 134 Pa. 31, 19 A. S. R. 669. See, generally, 7 Current Law, 118.



instrument bears evident marks of having been altered from the original draft, a presumption may arise concerning the time when the change was made, as to whether before or after execution and delivery of the writing, and the burden of adduction be thereby changed. The cases on this subject are in hopeless conflict.

For the purpose of determining whether a writing is admissible in evidence, it is held in some courts that, if the instrument has apparently been altered from the original draft, a presumption arises that the change was made after execution, and the instrument will not be admitted in evidence as a document touching the right to which the alteration relates, unless accompanied by evidence which tends to explain the change.<sup>100</sup> In other courts, a presumption prevails that the alteration was made at or before the execution of the instrument, and the writing is therefore admissible in evidence without explanation,<sup>101</sup> unless the character of the alteration is

<sup>100</sup> *Deed.* Pipes v. Hardesty, 9 La. Ann. 152, 61 A. D. 202; Simpkins v. Windsor, 21 Or. 382; Bullock v. Sprowls (Tex. Civ. App.) 54 S. W. 657.

*Negotiable instrument.* Merritt v. Boyden, 191 Ill. 136, 154, 85 A. S. R. 246, 258 (semble); Courcamp v. Weber, 39 Neb. 533; Nagle's Estate, 134 Pa. 31, 19 A. S. R. 669.

<sup>101</sup> Little v. Herndon, 10 Wall. (U. S.) 26 (land patent); Orlando v. Gooding, 34 Fla. 244 (bond); First Nat. Bank v. Franklin, 20 Kan. 264 (order of sale); Foley-Wadsworth Imp. Co. v. Solomon, 9 S. D. 511 (guaranty).

*Deed.* Ward v. Cheney, 117 Ala. 238; Kendrick v. Latham, 25 Fla. 819; Bedgood v. McLain, 89 Ga. 793; Sirrine v. Briggs, 31 Mich. 443; Hoey v. Jarman, 39 N. J. Law, 523; Rodriguez v. Haynes, 76 Tex. 225.

*Negotiable instrument.* Stayner v. Joyce, 120 Ind. 99; Neil v. Case, 25 Kan. 510, 37 A. R. 259; Wilson v. Hotchkiss' Estate, 81 Mich. 172; Stillwell v. Patton, 108 Mo. 352; Moddie v. Brelland, 9 S. D. 506; Beaman v. Russell, 20 Vt. 205, 49 A. D. 775 (semble); Yakima Nat. Bank v. Knipe, 6 Wash. 348.

*Receipt.* Welch v. Coulborn, 3 Houst. (Del.) 647; Printup v. Mitchell, 17 Ga. 553, 63 A. D. 258 (semble).

suspicious in itself, in which case a presumption arises that the change was made after execution, and the document will not be admitted unless accompanied by evidence in explanation of the change.<sup>162</sup> In other cases no presumption is indulged,<sup>163</sup> so that ordinary proof of execution entitles the instrument to admission in evidence without any preliminary explanation;<sup>164</sup> and this has been allowed even where the alteration was intrinsically suspicious,<sup>165</sup> the question of the time of alteration being left to the jury.

Thus far the presumption has been considered in its bearing on the admissibility of the document in evidence. The presumption is next to be considered, not as bearing on the admissibility of the document, but as affecting the right to recover on a document which had been admitted. Some cases hold that, in the absence of evidence to the contrary, an apparent alteration is presumed to have been made after deliv-

<sup>162</sup> *Kan. Mut. L. Ins. Co. v. Coalson*, 22 Tex. Civ. App. 64, 68 (policy); *Bradley v. Dells Lumber Co.*, 105 Wis. 245 (receipt).

*Bond.* *Orlando v. Gooding*, 34 Fla. 244; *Nesbitt v. Turner*, 155 Pa. 429.

*Deed.* *Ala. State Land Co. v. Thompson*, 104 Ala. 570, 53 A. S. R. 80; *Collins v. Ball*, 82 Tex. 259, 27 A. S. R. 877.

*Negotiable instrument.* *Neil v. Case*, 25 Kan. 510, 37 A. R. 259 (seem-ble); *Wilson v. Hotchkiss' Estate*, 81 Mich. 172; *Stillwell v. Patton*, 108 Mo. 352.

<sup>163</sup> *Klein v. German Nat. Bank*, 69 Ark. 140, 86 A. S. R. 183 (negotiable instrument); *Printup v. Mitchell*, 17 Ga. 558, 63 A. D. 258 (seem-ble; receipt).

<sup>164</sup> *Printup v. Mitchell*, 17 Ga. 558, 63 A. D. 258 (seem-ble; receipt); *Cosgrove v. Fanebust*, 10 S. D. 213 (deed); *Conner v. Fleschman*, 4 W. Va. 693 (bond).

*Negotiable instrument.* *Klein v. German Nat. Bank*, 69 Ark. 140, 86 A. S. R. 183; *Stayner v. Joyce*, 120 Ind. 99; *Cole v. Hills*, 44 N. H. 227; *Hunt v. Gray*, 35 N. J. Law, 227, 10 A. R. 232; *Beaman v. Russell*, 20 Vt. 205, 49 A. D. 775.

<sup>165</sup> *Welch v. Coulborn*, 3 Houst. (Del.) 647 (receipt); *Rodriguez v. Haynes*, 76 Tex. 225 (deed).

ery. The burden of showing the contrary is accordingly on the party claiming under the instrument, and, if he does not explain the alteration, he cannot recover on the writing.<sup>166</sup> Other courts hold that, in the absence of evidence to the contrary, the presumption is that an apparent alteration was made at the time of or before the execution of the instrument, so that the burden of establishing the contrary is on the party who attacks the instrument as introduced, and that, in the absence of such evidence, the holder may recover,<sup>167</sup> unless the

<sup>166</sup> *Prevost v. Gratz*, 1 Pet. C. C. 364, Fed. Cas. No. 11,406 (account).  
*Bond. U. S. v. Linn*, 1 How. (U. S.) 104; *Robinson v. State*, 60 Ind. 26, 36 (semble); *State v. Chick*, 146 Mo. 645; *Hodnett's Adm'r v. Pace's Adm'r*, 84 Va. 873.

*Contract. Walters v. Short*, 10 Ill. 252 (semble); *Kelly v. Thuey*, 143 Mo. 422.

*Deed. Galland v. Jackman*, 26 Cal. 79, 85 A. D. 172; *Burnham v. Ayer*, 35 N. H. 351; *Dow v. Jewell*, 18 N. H. 340, 45 A. D. 371.

*Negotiable instrument. Henman v. Dickinson*, 5 Bing. 183; *Bishop v. Chambre*, 3 Car. & P. 55; *Knight v. Clements*, 8 Adol. & E. 215; *Chism v. Toomer*, 27 Ark. 108; *Warren v. Layton*, 3 Har. (Del.) 404; *Harris v. Jacksonville Bank*, 22 Fla. 501, 1 A. S. R. 201 (semble); *Adair v. Eglad*, 58 Iowa, 314; *Dodge v. Haskell*, 69 Me. 429; *Commercial & R. Bank v. Lum*, 7 How. (Miss.) 414; *Hills v. Barnes*, 11 N. H. 395; *Cole v. Hills*, 44 N. H. 227; *Neff v. Horner*, 63 Pa. 327, 3 A. R. 555, 556 (semble); *Clark v. Eckstein*, 22 Pa. 507, 62 A. D. 307; *Paine v. Edsell*, 19 Pa. 178; *Kennedy v. Moore*, 17 S. C. 464; *Slater v. Moore*, 86 Va. 26.

*Will. Simmons v. Rudall*, 1 Sim. (N. S.) 115, 136; *Doe d. Shallcross v. Palmer*, 15 Jur. (pt. 1) 836; *Toebe v. Williams*, 80 Ky. 661. And see *Cutler v. Cutler*, 130 N. C. 1, 57 L. R. A. 209.

In some states, the burden of proof rests on the party claiming under the instrument, if execution is expressly denied, and only then. *Winkles v. Guenther*, 98 Ga. 472 (negotiable instrument); *Thompson v. Gowen*, 79 Ga. 70 (bond); *Wing v. Stewart*, 68 Iowa, 13 (contract).

<sup>167</sup> *Boothby v. Stanley*, 34 Me. 515 (sheriff's return); *North River Meadow Co. v. Christ Church*, 22 N. J. Law, 424, 53 A. D. 258 (assessment); *Wikoff's Appeal*, 15 Pa. 281, 53 A. D. 597 (will); *Kan. Mut. L. Ins. Co. v. Coalson*, 22 Tex. Civ. App. 64, 68 (semble; policy).

*Bond. Brand v. Johnrowe*, 60 Mich. 210; *Pullen v. Shaw*, 14 N. C.

alteration is of a character to excite suspicion, in which case the burden of adducing evidence in explanation of the alteration rests on the party claiming under the instrument, so that, unless he explains, the instrument will not sustain a recovery in his favor.<sup>168</sup> Yet other courts hold that there is no presumption in the matter,<sup>169</sup> some holding this apparently only where the alteration is of a suspicious character.<sup>170</sup>

(3 Dev.) 238; *Wicker v. Pope*, 12 Rich. Law (S. C.) 387, 75 A. D. 732; *Kleeb v. Bard*, 12 Wash. 140.

*Deed.* *Doe d. Tatum v. Catomore*, 16 Q. B. 745; *Cox v. Palmer*, 1 McCrary, 431, 3 Fed. 16; *Lewis v. Watson*, 98 Ala. 479, 39 A. S. R. 82; *Sharpe v. Orne*, 61 Ala. 263; *Peugh v. Mitchell*, 3 App. D. C. 321; *Stewart v. Preston*, 1 Fla. 10, 44 A. D. 621; *Wickes' Lessee v. Caulk*, 5 Har. & J. (Md.) 36; *McCormick v. Fitzmorris*, 39 Mo. 24.

*Negotiable instrument.* *Corcoran v. Doll*, 32 Cal. 82; *Bailey v. Taylor*, 11 Conn. 531, 534, 29 A. D. 321; *Portsmouth Sav. Bank v. Wilson*, 5 App. D. C. 8; *Wilson v. Hayes*, 40 Minn. 531, 12 A. S. R. 754; *Paramore v. Lindsey*, 63 Mo. 63; *Huntington v. Finch*, 3 Ohio St. 445; *Newman v. King*, 54 Ohio St. 273, 56 A. S. R. 705, 709 (semble); *Franklin v. Baker*, 48 Ohio St. 296, 29 A. S. R. 547; *Richardson v. Fellner*, 9 Okl. 513; *Wolferman v. Bell*, 6 Wash. 84, 36 A. S. R. 126; *Maldaner v. Smith*, 102 Wis. 30.

If the alteration is properly noted in the attestation clause, then of course no presumption of irregularity arises. *Smith v. U. S.*, 2 Wall. (U. S.) 219, 232.

If an instrument admitted in evidence in the trial is not produced for inspection by the supreme court, that court will presume, on appeal, that the instrument bore no apparent alteration, or that the alteration was not of a suspicious character. *Ward v. Cheney*, 117 Ala. 238; *Merritt v. Boyden*, 191 Ill. 136, 85 A. S. R. 246; *Wing v. Stewart*, 68 Iowa, 13; *Sirrine v. Briggs*, 31 Mich. 443; *Robinson v. Myers*, 67 Pa. 9.

<sup>168</sup> *Smith v. U. S.*, 2 Wall. (U. S.) 219, 232 (bond); *Wilde v. Armsby*, 6 Cush. (Mass.) 314 (guaranty); *Elgin v. Hall*, 82 Va. 680 (receipt).

*Deed.* *Cox v. Palmer*, 1 McCrary, 431, 3 Fed. 16; *Bailey v. Taylor*, 11 Conn. 531, 29 A. D. 321, 326 (semble); *Peugh v. Mitchell*, 3 App. D. C. 321; *Jackson v. Osborn*, 2 Wend. (N. Y.) 555, 20 A. D. 649.

*Negotiable instrument.* *Fontaine v. Gunter*, 31 Ala. 258, 265; *Paramore v. Lindsey*, 63 Mo. 63; *Simpson v. Stackhouse*, 9 Pa. 186, 49 A. D. 554.

If alterations appear in a public record, the presumption is that they were regularly made by the officer having the custody of the record, and not that they were unauthorized, unless their nature is such as to excite suspicion of their regularity.<sup>171</sup>

— **Presumption as to who made alteration.** In the absence of evidence to the contrary, the presumption is that an unauthorized alteration of an instrument was made by the party claiming under it or his privies, especially where it has been in his or their custody since execution.<sup>172</sup>

<sup>169</sup> *Klein v. German Nat. Bank*, 69 Ark. 140, 86 A. S. R. 183 (negotiable instrument); *Hagan v. Merchants' & B. Ins. Co.*, 81 Iowa, 321, 25 A. S. R. 493 (policy). And see *Johnson v. Marlborough*, 2 Starkie, 313.

*Deed.* *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 72 A. S. R. 216; *Milliken v. Marlin*, 66 Ill. 13.

In some states where there is said to be no presumption either way as to the time of alteration, the burden of adducing evidence that the alteration was made after delivery of the instrument rests on the party asserting it. *Hagan v. Merchants' & B. Ins. Co.*, 81 Iowa, 321, 25 A. S. R. 493. *Contra*, *Klein v. German Nat. Bank*, 69 Ark. 140, 86 A. S. R. 183. In other states it lies on the party claiming under the instrument to show that the alteration was made before execution (*Ely v. Ely*, 6 Gray [Mass.] 439; *Robinson v. Myers*, 67 Pa. 9, 16), especially if the alteration is suspicious (*Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 72 A. S. R. 216; *Paramore v. Lindsey*, 63 Mo. 63, 67; *Page v. Danaher*, 43 Wis. 221).

<sup>170</sup> *Paramore v. Lindsey*, 63 Mo. 63, 67 (negotiable instrument); *Robinson v. Myers*, 67 Pa. 9, 16 (deed); *Page v. Danaher*, 43 Wis. 221 (negotiable instrument).

<sup>171</sup> *Hommel v. Devinney*, 39 Mich. 522. See, however, *Dolph v. Barney*, 5 Or. 191.

<sup>172</sup> *Winter v. Pool*, 100 Ala. 503; *Ala. State Land Co. v. Thompson*, 104 Ala. 570, 53 A. S. R. 80; *Andrews v. Calloway*, 50 Ark. 358 (semble); *Bowman v. Mitchell*, 79 Ind. 84; *Maguire v. Eichmeier*, 109 Iowa, 301; *Shroeder v. Webster*, 88 Iowa, 627; *Croft v. White*, 36 Miss. 455; *Bowers v. Jewell*, 2 N. H. 543; *Nat. Ulster County Bank v. Madden*, 114 N. Y. 280, 11 A. S. R. 633; *Vaughan v. Fowler*, 14 S. C. 355, 37 A. R. 731, 733; *Porter v. Doby*, 2 Rich. Eq. (S. C.) 49; *Bowser v. Cole*, 74 Tex. 222. *Contra*, *Coulson v. Walton*, 9 Pet. (U. S.) 62, 78;

— **Presumption as to intent.** If, after delivery of an instrument, a material alteration is intentionally made therein by the holder, the presumption is that the change was made fraudulently, and there can be no recovery on the instrument.<sup>173</sup>

— **Rebuttal of presumptions—Questions for jury.** These presumptions being disputable, evidence is admissible to rebut them, and, when evidence in rebuttal has been adduced, the question when, by whom, and with what intent the alteration was made is to be submitted to the jury upon all the evidence, intrinsic and extrinsic.<sup>174</sup>

#### C. CAPACITY OF INFANTS.<sup>175</sup>

##### § 31. Crimes.

The presumption is that a person under fourteen years of age cannot commit crime. During those years he is presumed

*Davis v. Carlisle*, 6 Ala. 707; *Willard v. Ostrander*, 51 Kan. 481, 37 A. S. R. 294; *Phillips v. Breck's Ex'r*, 79 Ky. 465; *Wickes' Lessee v. Caulk*, 5 Har. & J. (Md.) 36, 41. See, also, 7 Current Law, 119.

<sup>173</sup> *Shroeder v. Webster*, 88 Iowa, 627.

This is a conclusive presumption, so-called, in an action on the instrument. *Owen v. Hall*, 70 Md. 97, 99. But it is rebuttable in an action on the original indebtedness evidenced by the instrument. *Warder v. Willyard*, 46 Minn. 531, 24 A. S. R. 250.

An immaterial alteration is not presumed to have been fraudulently made, however. *Croswell v. Labree*, 81 Me. 44, 10 A. S. R. 238; *Dow v. Jewell*, 18 N. H. 340, 45 A. D. 371.

<sup>174</sup> *Klein v. German Nat. Bank*, 69 Ark. 140, 86 A. S. R. 183; *Printup v. Mitchell*, 17 Ga. 558, 63 A. D. 258; *Winkles v. Guenther*, 98 Ga. 472; *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 72 A. S. R. 216; *Neil v. Case*, 25 Kan. 510, 37 A. R. 259; *Letcher v. Bates*, 6 J. J. Marsh. (Ky.) 524, 22 A. D. 92 (semble); *Pipes v. Hardesty*, 9 La. Ann. 152, 61 A. D. 202; *Milbery v. Storer*, 75 Me. 69, 46 A. R. 361; *Ely v. Ely*, 6 Gray (Mass.) 439, 442; *Wilson v. Hotchkiss' Estate*, 81 Mich. 172; *Wilson v. Hayes*, 40 Minn. 531, 12 A. S. R. 754; *Commercial & R. Bank v. Lum*, 7 How. (Miss.) 414; *Courcamp v. Weber*, 39 Neb. 533; *Cole v. Hills*, 44 N. H. 227; *Hunt v. Gray*, 35 N. J. Law, 227, 10 A. R. 232; *Robinson v. Myers*, 67 Pa. 9; *Moddie v. Brelland*, 9 S. D. 507; *Beaman v. Russell*, 20 Vt. 205, 49 A. D. 775.

to be so lacking in discretion as to be incapable in law of entertaining a criminal intent. This presumption is always a presumption of law; sometimes it is conclusive; sometimes disputable. If the infant is under seven years of age when the act was done, the presumption is conclusive that he was incapable of entertaining a criminal intent. Being conclusive, evidence is not admissible to show precocity, and the lack of years is accordingly a complete defense.<sup>176</sup>

If the infant has attained to the age of seven, but is under fourteen, the presumption of incapacity is disputable. The only effect of the presumption is to throw the burden on the state of showing by clear and satisfactory evidence that in fact the infant had sufficient discretion to distinguish between right and wrong, and to comprehend the nature and consequences of the act in question; and when such evidence is adduced, the question of criminal capacity becomes a question for the jury.<sup>177</sup>

<sup>176</sup> Presumptions touching the relation of parent and child, see §§ 70-73, *infra*.

<sup>176</sup> *Rex v. King's Langley*, 1 Strange, 631; *Marsh v. Loader*, 14 C. B. (N. S.) 535; *Hellman v. Com.*, 84 Ky. 457, 4 A. S. R. 207 (semble); *Willet v. Com.*, 13 Bush (Ky.) 230 (semble); *State v. Aaron*, 4 N. J. Law, 231, 7 A. D. 592, 596; *People v. Townsend*, 3 Hill (N. Y.) 479; *State v. Goin*, 9 Humph. (Tenn.) 174 (semble); *Law v. Com.*, 75 Va. 885, 40 A. R. 750, 752 (semble); *Long*, Dom. Rel. 372.

<sup>177</sup> *Rex v. Owen*, 4 Car. & P. 236; *Reg. v. Vamplew*, 3 Fost. & F. 520; *Reg. v. Smith*, 1 Cox Cr. Cas. 260; *Godfrey v. State*, 31 Ala. 323, 70 A. D. 494; *Martin v. State*, 90 Ala. 602, 24 A. S. R. 844; *McCormack v. State*, 102 Ala. 156; *Angelo v. People*, 96 Ill. 209, 36 A. R. 132; *State v. Fowler*, 52 Iowa, 103; *State v. Milholland*, 89 Iowa, 5 (semble); *Willet v. Com.*, 13 Bush (Ky.) 230; *Hellman v. Com.*, 84 Ky. 457, 4 A. S. R. 207; *State v. Nickleson*, 45 La. Ann. 1172; *Com. v. Mead*, 10 Allen (Mass.) 398; *State v. Adams*, 76 Mo. 355; *State v. Aaron*, 4 N. J. Law, 231, 7 A. D. 592; *State v. Yeargan*, 117 N. C. 706, 36 L. R. A. 196; *State v. Pugh*, 52 N. C. (7 Jones) 61; *State v. Goin*, 9 Humph. (Tenn.) 174; *Carr v. State*, 24 Tex. App. 562, 5 A. S. R. 905; *State v. Learnard*,

Similar presumptions prevail in certain classes of cases involving sexual intercourse. A male under fourteen was conclusively presumed at common law to be incapable of sexual intercourse; therefore he could not commit rape, nor attempt to commit it, and evidence of puberty in a boy of fewer years was accordingly inadmissible.<sup>178</sup> In the United States, however, the weight of authority regards this presumption as disputable, and the only effect of the presumption is to throw the burden on the state of adducing evidence of sexual capacity, which evidence, being adduced, makes the question one for the jury.<sup>179</sup>

41 Vt. 585; *Law v. Com.*, 75 Va. 885, 40 A. R. 750. And see *Irby v. State*, 32 Ga. 496; *Long*, Dom. Rel. 372.

This presumption decreases in strength as the infant approaches the age of 14. *Martin v. State*, 90 Ala. 602, 24 A. S. R. 844; *State v. Aaron*, 4 N. J. Law, 231, 7 A. D. 592, 596; *Law v. Com.*, 75 Va. 885, 40 A. R. 750, 752.

The question of capacity may be determined indirectly from the facts and circumstances incidentally in evidence, without independent evidence on the question. *State v. Toney*, 15 S. C. 409; *Carr v. State*, 24 Tex. App. 562, 5 A. S. R. 905; *Wusnig v. State*, 33 Tex. 651; *Law v. Com.*, 75 Va. 885, 40 A. R. 750, 752 (semble).

<sup>178</sup> *Clark & M. Crimes* (2d Ed.) § 129; *Reg. v. Brimlow*, 9 Car. & P. 366; *Reg. v. Waite* [1892] 2 Q. B. 600 (semble); *State v. Handy*, 4 Har. (Del.) 566 (semble); *McKinney v. State*, 29 Fla. 565, 30 A. S. R. 140 (semble); *State v. Pugh*, 52 N. C. (7 Jones) 61; *State v. Sam*, 60 N. C. (1 Winst. 300) 293; *Foster v. Com.*, 96 Va. 306, 70 A. S. R. 846. And see *Williams v. State*, 20 Fla. 777. He may, however, be convicted of aiding in the offense, at common law. *Heilman v. Com.*, 84 Ky. 457, 4 A. S. R. 207, 209 (semble); *Law v. Com.*, 75 Va. 885, 40 A. R. 750.

The same presumption of incapacity applies in cases of carnal abuse. *Reg. v. Jordan*, 9 Car. & P. 118.

In Louisiana it seems that no presumption whatever obtains. In any event, there is no conclusive presumption of incapacity arising from nonage. *State v. Jones*, 39 La. Ann. 935.

<sup>179</sup> *Gordon v. State*, 93 Ga. 531, 44 A. S. R. 189; *Heilman v. Com.*, 84 Ky. 457, 4 A. S. R. 207; *People v. Randolph*, 2 Parker Cr. R. (N. Y.) 174; *Williams v. State*, 14 Ohio, 222, 45 A. D. 536; *Wagoner v. State*, 5 Lea (Tenn.) 352, 40 A. R. 36. And see *McKinney v. State*, 29 Fla. 565, 30 A. S. R. 140, 144.



At common law, a boy under fourteen years of age could not be guilty of assault with intent to commit rape.<sup>180</sup> This is not the modern rule, however,<sup>181</sup> though in some states the burden is on the prosecution to show sexual capacity in order that a conviction may be had.<sup>182</sup>

These ages of incapacity are in some states changed by statute.

If the accused desires the benefit of the presumption of sexual incapacity, the burden is on him to show that he is of such age that the presumption arises.<sup>183</sup>

Beyond the age of fourteen years, no presumption of incapacity attaches, and the burden is accordingly upon an infant over that age to show a want of capacity, the same as if he were an adult.<sup>184</sup>

### § 32. Torts.

The presumptions of incapacity to commit crime do not prevail with reference to torts. Accordingly, an infant is, as a rule, liable for a tort the same as an adult, subject only to his being in fact of such age and discretion that he can have a wrongful intention, where such an intention is mate-

A statute dispensing with proof of emission does not change the rule. *Hiltabiddle v. State*, 35 Ohio St. 52, 35 A. R. 592.

<sup>180</sup> *Rex v. Eldershaw*, 3 Car. & P. 396; *Reg. v. Phillips*, 8 Car. & P. 736; *State v. Handy*, 4 Har. (Del.) 566 (semble); *State v. Sam*, 60 N. C. (1 Winst. 300) 293. He might, however, be convicted of common assault. *Reg. v. Brimlow*, 9 Car. & P. 366; *Reg. v. Phillips*, 8 Car. & P. 736; *Long, Dom. Rel.* 372.

<sup>181</sup> *Com. v. Green*, 2 Pick. (Mass.) 380; *Law v. Com.*, 75 Va. 885, 40 A. R. 750, 751 (semble).

<sup>182</sup> *McKinny v. State*, 29 Fla. 565, 30 A. S. R. 140; *Gordon v. State*, 93 Ga. 531, 44 A. S. R. 189.

<sup>183</sup> *State v. Arnold*, 35 N. C. (13 Ired.) 184.

<sup>184</sup> *State v. Handy*, 4 Har. (Del.) 566; *Chandler v. Com.*, 4 Metc. (Ky.) 66; *State v. Kluseman*, 53 Minn. 541; *Den d. Boyd v. Banta*, 1 N. J. Law, 266; *People v. Kendall*, 25 Wend. (N. Y.) 399, 37 A. D. 240 (semble); *State v. Goin*, 9 Humph. (Tenn.) 174 (semble); *State v. Learnard*, 41 Vt. 585.

rial,<sup>185</sup> and the infant is nevertheless liable, though he was under seven years of age when the wrong was done.<sup>186</sup>

In cases where an infant sues an adult for negligence, however, this rule is not applied so as to permit of the defense of contributory negligence, if the infant was so young as to be without discretion. Accordingly, in some cases it has been ruled that the infant in question was, because of his tender years, incapable, as a matter of law, of contributory negligence.<sup>187</sup> In other cases the infant has been held capable, as a matter of law, of exercising discretion.<sup>188</sup> In the ma-

<sup>185</sup> *Hammon*, Cont. § 168; *Peterson v. Haffner*, 59 Ind. 130, 26 A. R. 81; *Conway v. Reed*, 66 Mo. 346, 27 A. R. 354; *School Dist. v. Bragdon*, 23 N. H. 507; *Bullock v. Babcock*, 3 Wend. (N. Y.) 391. See *Shaw v. Coffin*, 58 Me. 254, 4 A. R. 290; *Sikes v. Johnson*, 16 Mass. 389; *Elwell v. Martin*, 32 Vt. 217. However, the presumption is that a boy under 14 years of age is not competent to perform duties involving the personal safety of others, and requiring the exercise of a good degree of judgment and discretion and constant care and watchfulness; and in an action for injuries resulting from negligence of a boy so employed, the burden is on his employer to show that he was in fact competent. *Molaske v. Ohio Coal Co.*, 86 Wis. 220.

<sup>186</sup> *Huchting v. Engel*, 17 Wis. 230, 84 A. D. 741.

<sup>187</sup> *Evansville v. Senhenn*, 151 Ind. 42, 68 A. S. R. 218; *Chicago W. Div. R. Co. v. Ryan*, 131 Ill. 474 (17 months); *Schmidt v. M. & St. P. R. Co.*, 23 Wis. 186, 99 A. D. 158 (18 months); *Kay v. Pa. R. Co.*, 65 Pa. 269, 3 A. R. 628 (19 months); *Bottoms v. S. & R. R. Co.*, 114 N. C. 699, 41 A. S. R. 799 (22 months); *Walters v. C., R. I. & P. R. Co.*, 41 Iowa, 71 (2 years); *Norfolk & P. R. Co. v. Ormsby*, 27 Grat. (Va.) 455 (2 years, 10 months); *Barnes v. S. C. R. Co.*, 47 La. Ann. 1218, 49 A. S. R. 400 (3 years); *Ihl v. F. S. St. & G. St. F. R. Co.*, 47 N. Y. 317, 7 A. R. 450 (3 years, 2 months); *Mangam v. B. R. Co.*, 38 N. Y. 455, 98 A. D. 66 (3 years, 7 months); *McGary v. Loomis*, 63 N. Y. 104, 20 A. R. 510 (4 years); *Summers v. Bergner Brew. Co.*, 143 Pa. 114, 24 A. S. R. 518 (4 years).

It has been held that a child under 6 years of age is prima facie incapable of contributory negligence. Hence the burden of showing him capable is on the defendant. *Chicago City R. Co. v. Tuohy*, 196 Ill. 410, 58 L. R. A. 270.

<sup>188</sup> *Hughes v. Macfie*, 33 Law J. Exch. 177 (5 years); *Gleason v. Smith*, 180 Mass. 6, 91 A. S. R. 261 (12 years).

jority of cases, however, where capacity was more in doubt, the question of discretion has been left to the jury.<sup>189</sup> It is to be observed that there is no presumption of law on the question, either one way or the other. Each case must be decided with reference to its own peculiar facts. One child may have a discretion which is found lacking in another of the same age, and may accordingly be held to greater care. Again, a child may have sufficient discretion to require it to act carefully under some circumstances, while under different circumstances it may be wholly incapable of judging for itself. To lay down a rule governing all cases is therefore impossible.

The foregoing remarks apply to children of tender years. If an infant has attained to the age of fourteen years, the presumption is, in the absence of clear evidence to the contrary, that he has sufficient intelligence to avoid danger.<sup>190</sup>

<sup>189</sup> *Lynch v. Smith*, 104 Mass. 52, 6 A. R. 138 (4 years, 7 months); *Westbrook v. M. & O. R. Co.*, 66 Miss. 560, 14 A. S. R. 587 (4 or 5 years); *Birge v. Gardner*, 19 Conn. 507 (6 or 7 years); *Wash. & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 401 (7 years); *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 58 A. R. 387 (7 years); *Dealey v. Muller*, 149 Mass. 432 (7 years); *Stone v. D. D., E. B. & B. R. Co.*, 115 N. Y. 104 (over 7 years); *Cent. R. & B. Co. v. Rylee*, 87 Ga. 491, 13 L. R. A. 634 (under 9 years); *Ihl v. F. S. St. & G. St. F. R. Co.*, 47 N. Y. 317, 7 A. R. 450, 453 (9 years, 6 months); *George v. L. A. R. Co.*, 126 Cal. 357, 46 L. R. A. 829 (9 years, 9 months); *Houston & T. C. R. Co. v. Simpson*, 60 Tex. 103 (10 years); *Kan. Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 A. R. 203 (12 years); *Kerr v. Forgue*, 54 Ill. 482, 5 A. R. 146 (about 12); *Strawbridge v. Bradford*, 128 Pa. 200 (13 years, 4 months); *Cincinnati St. R. Co. v. Wright*, 54 Ohio St. 181, 32 L. R. A. 340 (about 14).

It has been held that there is a disputable presumption of incapacity, where the infant is between 7 and 14 years of age. *Pratt C. & I. Co. v. Brawley*, 83 Ala. 371, 3 A. S. R. 751.

<sup>190</sup> *Benedict v. M. & St. L. R. Co.*, 86 Minn. 224, 91 A. S. R. 345; *Nagle v. A. V. R. Co.*, 88 Pa. 35, 32 A. R. 413; *Kehler v. Schwenk*, 144 Pa. 348, 27 A. S. R. 633.

## § 33. Contracts.

An infant is incapable of binding himself by contract, and contracts made by him before he attains majority may accordingly be avoided by him after that event.<sup>191</sup> The burden of proving infancy as a defense rests, however, on the defendant in an action on the contract.<sup>192</sup>

Generally speaking, the executed contracts of an infant are valid until disaffirmed, while his executory contracts are invalid unless he ratifies them after he attains his majority.<sup>193</sup> In an action on an infant's executory contract, such, for instance, as a promissory note, the burden of showing ratification rests accordingly on the plaintiff.<sup>194</sup>

If a promise to pay a debt contracted in infancy is conditional, the burden is on the promisee, in an action by him on the contract, to show that the contingency has happened.<sup>195</sup>

If a man has disposed of the consideration for a contract made in infancy, he may, in most states, avoid the contract

<sup>191</sup> Hammon, Cont. §§ 154, 155.

The age of consent to the marriage contract was fixed by the common law at the age of 14 years in males and 12 years in females. Under those ages, it was conclusively presumed that the parties were incapable of consenting to matrimony. Accordingly, when either spouse arrived at the age of consent, he or she might elect to avoid the marriage without aid of court. 1 Bl. Comm. 436; *Rex v. Gordon*, Russ. & R. 48; *Com. v. Munson*, 127 Mass. 459, 468; *Warwick v. Cooper*, 5 Sneed (Tenn.) 658; *Pool v. Pratt*, 1 D. Chip. (Vt.) 252 (semble). See *People v. Slack*, 15 Mich. 193.

<sup>192</sup> *Borthwick v. Carruthers*, 1 Term R. 648; *Foltz v. Wert*, 103 Ind. 404; *Starratt v. Mullen*, 148 Mass. 570, 571 (semble); *Simmons v. Simmons*, 8 Mich. 318. And see *Com. v. Moore*, 8 Pick. (Mass.) 194; *Jeffrie v. Robideaux*, 3 Mo. 33; *Hanly v. Levin*, 5 Ohio, 227.

<sup>193</sup> Hammon, Cont. § 171.

<sup>194</sup> *Henderson v. Fox*, 5 Ind. 489; *Tyler v. Gallop's Estate*, 68 Mich. 185, 13 A. S. R. 336.

<sup>195</sup> *Cole v. Saxby*, 3 Esp. 159; *Proctor v. Sears*, 4 Allen (Mass.) 95; *Minock v. Shortridge*, 21 Mich. 304; *Everson v. Carpenter*, 17 Wend. (N. Y.) 419; *Chandler v. Glover's Adm'r*, 32 Pa. 509.

without placing the other party in statu quo;<sup>196</sup> but the burden of showing that he is thus unable to restore the consideration rests upon him, and not on the adult party.<sup>197</sup>

While an infant is not generally liable on his contracts, yet he must pay for necessities furnished him on credit.<sup>198</sup> An article furnished to an infant may have the potential attributes of a necessary, and yet be not such, because, in the particular case, the infant did not need it. To render an infant liable as for necessities, a necessity for the thing furnished must have existed, regard being had to the infant's station in life and the particular circumstances of the case; and in an action to recover the price of articles so furnished, the burden of showing that the infant needed the articles rests on the plaintiff.<sup>199</sup> If, therefore, an infant resides at home with his parents, the presumption is that he is properly maintained by them, and he is not liable, even for the common necessities of life;<sup>200</sup> and the same is true with reference

<sup>196</sup> Hammon, Cont. § 174.

<sup>197</sup> Dickerson v. Gordon, 52 Hun, 614, 5 N. Y. Supp. 310; Lane v. Dayton C. & I. Co., 101 Tenn. 581. However, if the former infant is unable to restore the *status quo*, and the contract was fair and beneficial, he cannot, as a rule, recover back the consideration paid by him; but to preclude him from recovering back the consideration of a contract which he seeks to disaffirm, the other party must show that the situation above defined exists. Johnson v. N. W. M. L. Ins. Co., 56 Minn. 365, 45 A. S. R. 473.

<sup>198</sup> Hammon, Cont. § 158.

<sup>199</sup> Brooker v. Scott, 11 Mees. & W. 67, 68; Nicholson v. Wilborn, 13 Ga. 467; Wood v. Losey, 50 Mich. 475; Miller v. Smith, 26 Minn. 248, 250, 37 A. R. 407; Walling v. Toll, 9 Johns. (N. Y.) 141; Johnson v. Lines, 6 Watts & S. (Pa.) 80, 40 A. D. 542; Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274; Thrall v. Wright, 38 Vt. 494.

<sup>200</sup> Bainbridge v. Pickering, 2 W. Bl. 1325; Angel v. McLellan, 16 Mass. 28, 31; Decell v. Lewenthal, 57 Miss. 331, 34 A. R. 449; Perrin v. Wilson, 10 Mo. 451; Goodman v. Alexander, 165 N. Y. 289, 292; Walling v. Toll, 9 Johns. (N. Y.) 141; Guthrie v. Murphy, 4 Watts (Pa.) 80, 28 A. D. 681; Jones v. Colvin, 1 McMul. (S. C.) 14; Elrod

to an infant who has a guardian.<sup>201</sup> But this presumption is rebuttable, and the mere fact that an infant has a father or a guardian does not save him from liability for things which he actually needed when they were furnished, if it be shown that the father or guardian had failed in his duty to maintain the infant.<sup>202</sup> Again, if an infant has an income sufficient to enable him to pay cash for supplies, the presumption is that his wants have been fully supplied from that source, and one who furnishes him articles on credit has the burden of showing the contrary.<sup>203</sup>

#### D. CONTINUITY.

##### § 34. General rules.

Considered with reference to their duration, facts and states of fact are either ephemeral, intermittent, or continuing. If a fact or a state of facts, continuing in its nature, is shown to have once existed, the presumption is that it still continues to exist in the same way, and the burden of adducing evidence to the contrary is cast upon the adverse party. Stated in this abstract form, the presumption is one of law; that is, an assumption of fact, sanctioned by fixed rule of law, and in no

*v. Myers*, 2 Head (Tenn.) 33; *Nichol v. Steger*, 6 Lea (Tenn.) 393. This is true, even though the father is in poor circumstances. *Hoyt v. Casey*, 114 Mass. 397, 19 A. R. 371.

<sup>201</sup> *Nicholson v. Spencer*, 11 Ga. 607; *McKanna v. Merry*, 61 Ill. 177; *Davis v. Caldwell*, 12 Cush. (Mass.) 512, 513; *Kline v. L'Amoureux*, 2 Paige (N. Y.) 419, 22 A. D. 652; *Goodman v. Alexander*, 165 N. Y. 289, 292; *Freeman v. Bridger*, 49 N. C. (4 Jones) 1, 67 A. D. 258; *Guthrie v. Murphy*, 4 Watts (Pa.) 80, 28 A. D. 681; *Kraker v. Byrum*, 13 Rich. Law (S. C.) 163; *Elrod v. Myers*, 2 Head (Tenn.) 33; *Nichol v. Steger*, 6 Lea (Tenn.) 393.

<sup>202</sup> *Tralner v. Trumbull*, 141 Mass. 527; *Parsons v. Keys*, 43 Tex. 557. See *Brayshaw v. Eaton*, 7 Scott, 183.

<sup>203</sup> *Nicholson v. Wilborn*, 13 Ga. 467; *Rivers v. Gregg*, 5 Rich. Eq. (S. C.) 274. See *Burghart v. Hall*, 4 Mees. & W. 727; *Barnes v. Toye*, 13 Q. B. Div. 410, 412.

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wise dependent upon a process of reasoning for its existence and effect. In other words, evidence that a state of facts permanent in its nature once existed becomes legally equivalent to direct evidence of its present existence.<sup>204</sup> As applied to many cases, however, the presumption is regarded as one of fact; that is, an inference which the jury may draw or refuse to draw, as may seem reasonable to them.<sup>205</sup> In any event, the presumption is rebuttable, and, when evidence tending to overcome it is adduced, the question of the present existence of the fact in dispute becomes one for the jury upon all the evidence.<sup>206</sup>

To give rise to the inference or presumption of continuity, the state of facts shown to have once existed must be permanent or continuing in its nature. If it is a state of facts that in the nature of things could not long exist, or that could exist only intermittently, the presumption or inference does not arise.<sup>207</sup>

<sup>204</sup> *Anderson v. Morice*, L. R. 10 C. P. 58, 68; *Charles Green's Son v. Salas*, 31 Fed. 106; *Metzger v. Schultz*, 16 Ind. App. 454, 59 A. S. R. 323; *Adams v. Slate*, 87 Ind. 573; *McMahon v. Harrison*, 6 N. Y. 443; *Love v. Edmonston*, 27 N. C. (5 Ired.) 354; *Toledo v. Sheill*, 53 Ohio St. 447, 30 L. R. A. 598. And see *Poe v. Dorrah*, 20 Ala. 288, 56 A. D. 196; *Garner v. Green*, 8 Ala. 96; *Brown v. Burnham*, 28 Me. 38.

An offer, once made, is presumed to remain open for a reasonable time to enable the offeree to accept it. *Hammon*, Cont. § 66.

If goods are delivered to an initial carrier in good condition, the presumption is that they remain so, and the burden is accordingly on the last connecting carrier to show that the goods were not in that condition when they came into his hands. See § 68(d), *infra*.

Presumption that foreign law, once ascertained, remains the same, see § 105(b), *infra*.

<sup>205</sup> *Pickup v. Thames & M. M. Ins. Co.*, 3 Q. B. Div. 594, *Thayer*, Cas. Ev. 106, 109; *Donahue v. Coleman*, 49 Conn. 464.

<sup>206</sup> *Chillingworth v. Eastern Tinware Co.*, 66 Conn. 306; *Dugas v. Estiletts*, 5 La. Ann. 559.

<sup>207</sup> *Scott v. Wood*, 81 Cal. 398; *Donahue v. Coleman*, 49 Conn. 464; *Goodsell v. Taylor*, 41 Minn. 207, 16 A. S. R. 700.

If insanity appears to be a temporary disease, the burden of show-

The presumption of continuity may have a retrospective operation; that is to say, an inference of the prior existence of a state of facts may in some cases be drawn from its present existence.<sup>208</sup> Thus, if a vessel becomes leaky or otherwise disabled without adequate cause, shortly after sailing, the natural inference is that she was unseaworthy when she sailed.<sup>209</sup> To justify a retrospective presumption, however, the fact in question must, by the weight of authority, be of such a nature that its present existence cannot be accounted for except by assuming its existence at some time in the past, which is, as a rule, a time not far remote.<sup>210</sup>

### § 35. Illustrations.

Ownership shown to have existed at a time in the past is presumed to continue until alienation is shown;<sup>211</sup> and pos-

ing its continuance rests on the party asserting it. See § 88, *infra*. As to possession, see note 212, *infra*. As to war, see note 231, *infra*.

<sup>208</sup> *Ames v. Dorroh*, 76 Miss. 187, 71 A. S. R. 522.

In an action for injuries caused by a defective sidewalk, it is competent to show the condition of the walk shortly after the accident, there being no evidence of an intermediate change. *Berrenberg v. Boston*, 137 Mass. 231, 50 A. R. 296; *Hall v. Austin*, 73 Minn. 134.

Retrospective operation of presumption of continuance of insanity, see § 88, note 771, *infra*.

<sup>209</sup> *Watson v. Clark*, 1 Dow, 336; *Pickup v. Thames & M. M. Ins. Co.*, 3 Q. B. Div. 594, Thayer, Cas. Ev. 106; *Anderson v. Morice*, L. R. 10 C. P. 58, 68; *Cort v. Del. Ins. Co.*, 2 Wash. C. C. 375, Fed. Cas. No. 3,257; *Talcot v. Commercial Ins. Co.*, 2 Johns. (N. Y.) 124, 3 A. D. 406; *Myers v. Girard Ins. Co.*, 26 Pa. 192; *Cameron v. Rich*, 4 Strob. Law (S. C.) 168, 53 A. D. 670.

<sup>210</sup> *Murdock v. State*, 68 Ala. 567; *Windhaus v. Bootz*, 92 Cal. 617; *Erskine v. Davis*, 25 Ill. 251; *Dugas v. Estletts*, 5 La. Ann. 559; *Taylor v. Creswell*, 45 Md. 422; *Hingham v. South Scituate*, 7 Gray (Mass.) 229, 232; *Dixon v. Dixon*, 24 N. J. Eq. 133; *Jarvis v. Vanderford*, 116 N. C. 147; *Martyn v. Curtis*, 67 Vt. 263, 265; *Body v. Jewsen*, 33 Wis. 402.

<sup>211</sup> *Kidder v. Stevens*, 60 Cal. 414; *Chillingworth v. Eastern Tinware Co.*, 66 Conn. 306; *Brown v. Castellaw*, 33 Fla. 204; *Abbott v. Union*



session, shown once to have existed, is subject to the like presumption, in the absence of evidence to the contrary.<sup>212</sup>

Indebtedness, if shown to have existed at a given time in the past, is presumed to continue for a reasonable time;<sup>213</sup>

*Mut. L. Ins. Co.*, 127 Ind. 70, 75; *Sullivan v. Goldman*, 19 La. Ann. 12; *Magee v. Scott*, 9 Cush. (Mass.) 148, 55 A. D. 49; *Ormsby v. Barr*, 22 Mich. 80; *Lind v. Lind*, 53 Minn. 48; *Rhone v. Gale*, 12 Minn. 54; *Hanson v. Chiatovich*, 13 Nev. 395; *Table Mountain G. & S. Min. Co. v. W. D. S. Min. Co.*, 4 Nev. 218, 97 A. D. 526; *Scammon v. Scammon*, 28 N. H. 419; *Jackson v. Potter*, 4 Wend. (N. Y.) 672; *Boozar v. Teague*, 27 S. C. 348; *Teetshorn v. Hull*, 30 Wis. 162; *Harriman v. Queen Ins. Co.*, 49 Wis. 71. And see *Milburn v. Phillips*, 136 Ind. 680.

The presumption is not rebutted by evidence that the original owner allowed another to take possession. *Magee v. Scott*, 9 Cush. (Mass.) 148, 55 A. D. 49.

The presumption applies to ownership of shares of stock in a corporation. *Montgomery & W. Plank-Road Co. v. Webb*, 27 Ala. 618.

<sup>212</sup> *Lazarus v. Phelps*, 156 U. S. 202, 205; *Hollingsworth v. Walker*, 98 Ala. 543; *Clements v. Hays*, 76 Ala. 280; *Robson v. Rawlings*, 79 Ga. 354; *McMullen v. Winfield B. & L. Ass'n*, 64 Kan. 298, 91 A. S. R. 236; *Sullivan v. Goldman*, 19 La. Ann. 12; *Currier v. Gale*, 9 Allen (Mass.) 522; *Brown v. King*, 5 Metc. (Mass.) 173; *Rogers v. Benton*, 39 Minn. 39, 12 A. S. R. 613; *Wilkins v. Earle*, 44 N. Y. 172, 4 A. R. 655, 664. And see *Eaton v. Woydt*, 26 Wis. 383.

If the character of possession is shown to have been adverse at a particular time in the past, it is presumed to retain that character. *Barrett v. Stradl*, 73 Wis. 385, 9 A. S. R. 795. If, on the other hand, possession is shown to have once existed in subordination to another's title, it is presumed to retain that character. *Hill v. Goolsby*, 41 Ga. 289, 291; *Leport v. Todd*, 32 N. J. Law, 124; *Hood v. Hood*, 2 Grant Cas. (Pa.) 229.

This presumption will not be indulged as to personal property, where fifteen years have elapsed since possession was held. *Allen v. Brown*, 83 Ga. 161. Nor will the fact that a paper was seen in testator's possession eight months before his death give rise to a presumption that it was found there at or after his death. *Adams v. Clark*, 53 N. C. (8 Jones) 56.

It seems that this presumption should not operate retrospectively for several years. *Martyn v. Curtis*, 67 Vt. 263, 265.

<sup>213</sup> *Jackson v. Irvin*, 2 Camp. 48, 50; *O'Neil v. N. Y. & S. P. Min. Co.*, 3 Nev. 141, 147.

and the like is true of a condition of solvency or insolvency, which also is presumed to continue for a reasonable length of time, in the absence of evidence to the contrary.<sup>214</sup>

The presumption of continuance applies also to liens<sup>215</sup> and to judgments.<sup>216</sup> If, therefore, one of these is shown to have existed at a given time in the past, the presumption is, in the absence of evidence to the contrary, that it continues to exist.

A particular relation which is shown to have existed between certain persons at a specified time in the past is presumed to continue until evidence is given to the contrary.<sup>217</sup> This

The presumption applies, although the debt had not matured at the time it is directly proved to have been in existence. *Farr v. Payne*, 40 Vt. 615.

A presumption of payment may arise from long lapse of time, however, in which case the presumption of continuity vanishes. See § 75, *infra*.

A note once proved to exist is presumed to exist still, in the absence of further evidence. *Bell v. Young*, 1 Grant Cas. (Pa.) 175.

<sup>214</sup> *Donahue v. Coleman*, 49 Conn. 464; *Wallace v. Hull*, 28 Ga. 68; *Adams v. Slate*, 87 Ind. 573; *Towns v. Smith*, 115 Ind. 480, 483; *Mullen v. Pryor*, 12 Mo. 307; *Walrod v. Ball*, 9 Barb. (N. Y.) 271; *Body v. Jewsen*, 33 Wis. 402.

The presumption may have a retrospective operation. *Ames v. Dorough*, 76 Miss. 187, 71 A. S. R. 522. But it will not be allowed to operate back five years. *Windhaus v. Bootz*, 92 Cal. 617.

<sup>215</sup> See *Crampton v. Prince*, 83 Ala. 246, 3 A. S. R. 718; *Hays v. Horine*, 12 Iowa, 61, 79 A. D. 518; *Kirkwood v. Hoxie*, 95 Mich. 62, 35 A. S. R. 549; *Childs v. Merrill*, 63 Vt. 463, 14 L. R. A. 264. It has been held, however, that, where an attachment of the debt in suit is relied on as a defense, the burden of showing that the attachment is still in force is on the defendant. *Bacon v. Smith*, 2 La. Ann. 441, 46 A. D. 549.

<sup>216</sup> *Murphy v. Orr*, 32 Ill. 489.

Continuance of jurisdiction which has once attached is presumed in favor of the subsequent judgment. *Lockhart v. Locke*, 42 Ark. 17.

<sup>217</sup> *Eames v. Eames*, 41 N. H. 177; *Love v. Edmonston*, 27 N. C. (5 Ired.) 354; *Schmit v. Day*, 27 Or. 110.

Relation between possessor of property and titular owner, see note 212, *supra*.

rule is instanced by various commercial relations, such as agency,<sup>218</sup> partnership,<sup>219</sup> and the corporate relation.<sup>220</sup> The rule is instanced also in social relations. Thus, if adulterous intercourse is shown to have once existed between certain persons, it is presumed to continue so long as opportunity permits it.<sup>221</sup> And if a person is shown to have been unmarried at a particular time, it has been held that he is presumed to remain so, in the absence of other evidence on the subject.<sup>222</sup> So, if marriage of certain persons at a time in the past is proved, the continuance of that relation is ordinarily presumed until death or divorce is shown.<sup>223</sup> If, however, it appears that

<sup>218</sup> *McKenzie v. Stevens*, 19 Ala. 691; *Hensel v. Maas*, 94 Mich. 563; *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606; *Hall v. Union Cent. L. Ins. Co.*, 23 Wash. 610, 51 L. R. A. 288.

<sup>219</sup> *Garner v. Green*, 8 Ala. 96, 98 (semble); *Cooper v. Dedrick*, 22 Barb. (N. Y.) 516.

<sup>220</sup> *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351.

<sup>221</sup> *Carotti v. State*, 42 Miss. 334; *Smith v. Smith*, 4 Paige (N. Y.) 432, 27 A. D. 75, 78.

This presumption will not ordinarily be given a retrospective operation. *Dixon v. Dixon*, 24 N. J. Eq. 133.

Unlawful intercourse being established, no legal presumption of reformation can arise from the fact of nonintercourse for several months, there being no opportunity for it. *People v. Squires*, 49 Mich. 487.

<sup>222</sup> *Contra*, *Bennett v. State*, 103 Ga. 66, 68 A. S. R. 77.

Thus, if a person who has been absent and unheard of for seven years was single when last heard of, the presumption is that he remained so until the time of his death, which is presumed from the lapse of time. *Rowe v. Hasland*, 1 W. Bl. 404; *Doe d. Banning v. Griffin*, 15 East, 293; *Loring v. Steineman*, 1 Metc. (Mass.) 204, 211. And see *Shown v. McMackin*, 9 Lea (Tenn.) 601, 42 A. R. 680. *Contra*, *Still v. Hutto*, 48 S. C. 415.

A person claiming under a deed made by the titular owner alone does not have the burden of showing that the grantor was single, or, if married, that the land was not his homestead, so as to account for the absence of a wife's signature. *Nicodemus v. Young*, 90 Iowa, 423.

<sup>223</sup> *People v. Stokes*, 71 Cal. 263; *Wallace v. Pereles*, 109 Wis. 316, 83 A. S. R. 898. *Contra*, *Page v. Findley*, 5 Tex. 391.

one of the spouses has remarried, this fact, in connection with other circumstances, dispels the presumption of the continuance of the first marriage, and it may be presumed in favor of the second marriage, when its validity is questioned, that the former spouse is either dead<sup>224</sup> or divorced.<sup>225</sup> A divorce is not always thus presumed in favor of a second marriage, however. Each case rests on its own peculiar facts and circumstances, and such inferences as may fairly be drawn from them.<sup>226</sup> In other words, the presumption of divorce is a presumption of fact, so-called, and not a presumption of law.

The presumption of coverture does not operate retrospectively. *Murdock v. State*, 68 Ala. 567; *Erskine v. Davis*, 25 Ill. 251.

<sup>224</sup> Section 62(c), *infra*.

<sup>225</sup> *Hunter v. Hunter*, 111 Cal. 261, 52 A. S. R. 180; *Pittinger v. Pittinger*, 28 Colo. 308, 89 A. S. R. 193; *Erwin v. English*, 61 Conn. 502; *Schmisser v. Beatrice*, 147 Ill. 210; *Coal Run Coal Co. v. Jones*, 127 Ill. 379; *Boulden v. McIntire*, 119 Ind. 574, 12 A. S. R. 453; *Wenning v. Teeple*, 144 Ind. 189; *Leach v. Hall*, 95 Iowa, 611; *Parsons v. Grand Lodge, A. O. U. W.*, 108 Iowa, 6; *Blanchard v. Lambert*, 43 Iowa, 228, 22 A. R. 245; *Tuttle v. Raish*, 116 Iowa, 331; *Harrison v. Lincoln*, 48 Me. 205; *Kelly v. Drew*, 12 Allen (Mass.) 107, 90 A. D. 138; *Ala. & V. R. Co. v. Beardsley*, 79 Miss. 417, 89 A. S. R. 660; *Klein v. Laudman*, 29 Mo. 259; *Hadley v. Rash*, 21 Mont. 170, 69 A. S. R. 649; *Carroll v. Carroll*, 20 Tex. 731; *Nixon v. Wichita L. & C. Co.*, 84 Tex. 408; *Goldwater v. Burnside*, 22 Wash. 215. *Contra*, *Wilson v. Allen*, 108 Ga. 275; *McDeed v. McDeed*, 67 Ill. 545; *Com. v. Boyer*, 7 Allen (Mass.) 306; *Smith v. Smith*, 5 Ohio St. 32.

Legislative ratification of decree of divorce may be presumed from great lapse of time, in connection with fact of remarriage of one of the parties. *Wilson v. Holt*, 83 Ala. 528, 3 A. S. R. 768. See, however, *McCarty v. McCarty*, 2 Strob. Law (S. C.) 6, 47 A. D. 585.

This presumption of divorce is of course rebuttable. *Schmisser v. Beatrice*, 147 Ill. 210; *Cole v. Cole*, 153 Ill. 585; *Harrison v. Lincoln*, 48 Me. 205.

<sup>226</sup> *Goodwin v. Goodwin*, 113 Iowa, 319; *Barnes v. Barnes*, 90 Iowa, 282; *Williams v. Williams*, 63 Wis. 58, 53 A. R. 253.

To give rise to the presumption of divorce, there must be something based on the conduct of both parties to the first marriage inconsistent with its continuance. *Ellis v. Ellis*, 58 Iowa, 720; *Gilman v. Sheets*, 78 Iowa, 499. And the presumption does not arise where the former

Character and state of mind of a particular person, as shown once to have existed, are presumed to continue.<sup>227</sup>

Domicile, residence, or settlement in a particular place, shown once to have existed, is presumed to continue;<sup>228</sup> and the same is true of alienage.<sup>229</sup>

Incumbency of office at a given time in the past being shown, the presumption is that it continues during the term of office prescribed by law.<sup>230</sup>

spouses separated only three years previously, and the records of the only courts in which a divorce might lawfully have been obtained are accessible. *Cartwright v. McGown*, 121 Ill. 388, 2 A. S. R. 105.

<sup>227</sup> *State v. Johnson*, 23 N. C. (1 Ired.) 354, 35 A. D. 742.

Presumption of continuance of insanity, see section 88, *infra*.

Mendacity, shown once to have existed, is presumed to continue. *Scammon v. Scammon*, 28 N. H. 419, 434 (*semble*); *Sleeper v. Van Middlesworth*, 4 Denio (N. Y.) 431; *Lum v. State*, 11 Tex. App. 483.

This presumption has been held not to arise after a lapse of three years. *Wood v. Matthews*, 73 Mo. 477.

Knowledge of the details of a private business transaction will not be presumed to continue for nine years in the party's mind, so as to charge him with fraud. *Goodwin v. Dean*, 50 Conn. 517.

<sup>228</sup> *Rex v. Tanner*, 1 Esp. 304, 306; *Mitchell v. U. S.*, 21 Wall. (U. S.) 350, 353; *Daniels v. Hamilton*, 52 Ala. 105; *Prather v. Palmer*, 4 Ark. 456; *Botna Valley State Bank v. Silver City Bank*, 87 Iowa, 479; *Greenfield v. Camden*, 74 Me. 56; *Bowdoinham v. Phippsburg*, 63 Me. 497; *Chicopee v. Whately*, 6 Allen (Mass.) 508; *Nixon v. Palmer*, 10 Barb. (N. Y.) 175; *Price v. Price*, 156 Pa. 617; *Rixford v. Miller*, 49 Vt. 319. See, however, *Ripley v. Hebron*, 60 Me. 379.

Nonresidence, once shown, is presumed to continue. *State Bank v. Seawell*, 18 Ala. 616; *Kaufman v. Caughman*, 49 S. C. 159, 61 A. S. R. 808.

The presumption of residence will not be given a retrospective operation of forty-seven years. *Hingham v. South Scituate*, 7 Gray (Mass.) 229, 232.

<sup>229</sup> *Charles Green's Son v. Salas*, 31 Fed. 106.

<sup>230</sup> *Rex v. Budd*, 5 Esp. 230; *Kaufman v. Stone*, 25 Ark. 336, 345; *Kinyon v. Duchene*, 21 Mich. 498, 501. See *Urmston v. State*, 73 Ind. 175.

This presumption will not operate retrospectively for several years. *Jarvis v. Vanderford*, 116 N. C. 147.

If a condition of war or of peace is shown to have existed at a given time in the past, the presumption is that it continues, in the absence of evidence to the contrary.<sup>231</sup>

The presumption of continuance applies also to treaties shown to have been once in force,<sup>232</sup> and also to customs and usages.<sup>233</sup>

Seaworthiness, shown once to have existed, is presumed to continue.<sup>234</sup>

#### E. CONVERSION.

§ 36. If a person in possession of personal property refuses to deliver it to the rightful owner upon the latter's demand, evidence of the demand and refusal is equivalent in law, in an action of trover, to evidence that the possessor has converted the goods, and the burden is therefore upon him to justify his refusal. In other words, evidence of a demand and refusal raises a presumption of conversion.<sup>235</sup> Originally, this presumption was doubtless no more than an inference,—a so-called presumption of fact, which gained its present form of legal presumption in the mode of development already sketched in an earlier part of the chapter.<sup>236</sup>

The presumption of conversion is not conclusive. Demand and refusal are not in themselves a conversion, and the pre-

<sup>231</sup> *Covert v. Gray*, 34 How. Pr. (N. Y.) 450, 455; *People v. McLeod*, 1 Hill (N. Y.) 377, 25 Wend. 483, 37 A. D. 328. There is no presumption that an existing war will continue in the future, however. *Covert v. Gray*, *supra*.

<sup>232</sup> *People v. McLeod*, 1 Hill (N. Y.) 377, 25 Wend. 483, 37 A. D. 328.

<sup>233</sup> *Scales v. Key*, 11 Adol. & E. 819.

<sup>234</sup> *Martin v. Fishing Ins. Co.*, 20 Pick. (Mass.) 389, 32 A. D. 220.

Presumption of previous unseaworthiness, see § 34, *supra*.

<sup>235</sup> *Thompson v. Rose*, 16 Conn. 71, 41 A. D. 121; *Moody v. Whitney*, 38 Me. 174, 61 A. D. 239; *Magee v. Scott*, 9 Cush. (Mass.) 148, 55 A. D. 49; *Bradley v. Spofford*, 23 N. H. 444, 55 A. D. 205; *Lockwood v. Bull*, 1 Cow. (N. Y.) 322, 13 A. D. 539.

<sup>236</sup> Section 16(a), *supra*.

sumption may therefore be rebutted by evidence justifying the refusal.<sup>237</sup>

To raise the presumption, the property must have been in the possession of the person refusing,<sup>238</sup> the refusal must have been absolute and unconditional,<sup>239</sup> and it must have been made to the owner or his agent.<sup>240</sup>

F. FABRICATION, SPOILIATION, SUPPRESSION, AND NONPRODUCTION OF EVIDENCE.

§ 37. General considerations.

If a party fabricates, spoliates, suppresses, or withholds evidence concerning a fact in dispute, it naturally gives rise to an inference that a disclosure of the truth of the matter in question would prejudice his case; otherwise there would be no motive for his act. Evidence is therefore admissible to show what he has done in that regard, if it does not incidentally appear; and counsel may comment on it in the argument to the jury, and the court may instruct the jury as to their right or duty to draw the inference.

<sup>237</sup> *Webber v. Davis*, 44 Me. 147, 69 A. D. 87; *Packard v. Getman*, 6 Cow. (N. Y.) 757, 16 A. D. 475; *Hill v. Covell*, 1 N. Y. 522; *Cobb v. Wallace*, 5 Cold. (Tenn.) 539, 98 A. D. 435; *Irish v. Cloyes*, 8 Vt. 30, 30 A. D. 446.

<sup>238</sup> *Carr v. Clough*, 26 N. H. 280, 59 A. D. 345; *Hallenbake v. Fish*, 8 Wend. (N. Y.) 547, 24 A. D. 88; *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586, 41 A. D. 767; *Wamsley v. Atlas S. S. Co.*, 168 N. Y. 533, 85 A. S. R. 699; *Canning v. Owen*, 22 R. I. 624, 84 A. S. R. 858; *Irish v. Cloyes*, 8 Vt. 30, 30 A. D. 446.

<sup>239</sup> *Bolling v. Kirby*, 90 Ala. 215, 24 A. S. R. 789; *Dent v. Chiles*, 5 Stew. & P. (Ala.) 383, 26 A. D. 350; *Taylor v. Spears*, 6 Ark. 381, 44 A. D. 519. Thus, if the possessor entertains a well-grounded doubt as to the demandant's title, and refuses to deliver the property to him until that doubt is removed, no presumption of conversion arises. *Zachary v. Pace*, 9 Ark. 212, 47 A. D. 744; *Fletcher v. Fletcher*, 7 N. H. 452, 28 A. D. 359; *Dowd v. Wadsworth*, 13 N. C. (2 Dev.) 130, 18 A. D. 567.

<sup>240</sup> *Irish v. Cloyes*, 8 Vt. 30, 30 A. D. 446.

Fabrication of evidence consists in the manufacture of some instrument of real or documentary evidence, or in perjury or subornation of perjury. Spoliation of evidence consists in the destruction or mutilation of some instrument of real or documentary evidence. Suppression of evidence consists in active means taken to prevent the adduction of evidence by way of removal or concealment of the instrument of evidence; as where some article or document is removed or concealed, or a prospective witness is induced to conceal himself or to leave the jurisdiction. Nonproduction of evidence consists in the mere failure to adduce evidence which it is in the power of the party to adduce. It is a negative term, and is so distinguishable from suppression of evidence, which involves the use of active means to prevent a disclosure of the matter in dispute.

The inference may be drawn from the fabrication, spoliation, suppression, or nonproduction of evidence, whether the party does the act personally or by agent;<sup>241</sup> and it may be drawn, even though the act was done in a former trial,<sup>242</sup> or in connection with another case.<sup>243</sup> If, however, several facts are in issue, and the party fabricates, spoliates, suppresses, or

<sup>241</sup> *Chicago C. R. Co. v. McMahon*, 103 Ill. 485, 42 A. R. 29; *Com. v. Locke*, 145 Mass. 401.

If the act is not done by the party himself, then of course he must be connected with it by evidence of agency, else no inference may be drawn against him. *The Queen's Case*, 2 Brod. & B. 302; *Martin v. State*, 28 Ala. 71; *Fox v. Hale & N. S. Min. Co.*, 108 Cal. 369, 419; *Matthews v. Hershey Lumber Co.*, 65 Minn. 372; *Green v. Woodbury*, 48 Vt. 5. Thus, the fact that a witness for one accused of crime testifies falsely is not evidence of the accused's guilt, in the absence of evidence that he was privy to the falsification. *State v. Brown*, 76 N. C. 222. See, generally, as to effect of spoliation, 7 *Current Law*, 1517.

<sup>242</sup> *Cole v. L. S. & M. S. R. Co.*, 95 Mich. 77; *McHugh v. McHugh*, 186 Pa. 197, 65 A. S. R. 849. See, however, *Enos v. St. Paul F. & M. Ins. Co.*, 4 S. D. 639, 46 A. S. R. 796.

<sup>243</sup> *Ga. R. & B. Co. v. Lybrend*, 99 Ga. 421.



withholds evidence as to only one of those facts, or as to several facts less than all, then the unfavorable inference created by his act is not general, but limited to the fact or facts as to which his act relates. If, for example, in an action of trespass for wrongfully taking silk and other articles belonging to the plaintiff, it appears that the defendant took the silk, the fact that he refuses to produce it or allow it to be examined and measured would justify an inference unfavorable to his contention as to its quantity and value, but would not justify an inference that he had taken the other articles also.<sup>244</sup>

To justify the inference, the fact of fabrication, spoliation, suppression, or nonproduction must be clearly established.<sup>245</sup> For instance, in the absence of evidence of fabrication,<sup>246</sup> the fact that one accused of crime fails in his attempt to prove an alibi gives rise to no inference that he was present at the place charged.<sup>247</sup>

The rules here announced apply in actions both civil and criminal, and they apply to all kinds of evidence, whether real, documentary, or testimonial.

### § 38. Real or demonstrative evidence.

If a party fabricates, spoliates, suppresses, or withholds evidence of the kind termed real or demonstrative, it may give rise to an unfavorable inference as to the truth of his contentions.<sup>248</sup> Thus, if a party in possession of articles which

<sup>244</sup> *Harris v. Rosenberg*, 43 Conn. 227.

<sup>245</sup> *Cowper v. Cowper*, 2 P. Wms. 720, 738, 748; *The Tillie*, 7 Ben. 382, 384, Fed. Cas. No. 14,048; *Lucas v. Brooks*, 23 La. Ann. 117; *State v. Chee Gong*, 16 Or. 534; *State v. Williams*, 27 Vt. 724, 726; *Welty v. L. S. T. & T. R. Co.*, 100 Wis. 128.

<sup>246</sup> *Com. v. McMahon*, 145 Pa. 413; *State v. Ward*, 61 Vt. 153.

<sup>247</sup> *Albritton v. State*, 94 Ala. 76; *People v. Malaspina*, 57 Cal. 628; *Miller v. People*, 39 Ill. 457; *White v. State*, 31 Ind. 262; *Toler v. State*, 16 Ohio St. 583; *Turner v. Com.*, 86 Pa. 54, 27 A. R. 683.

<sup>248</sup> If a party having the power to introduce in evidence an object

would be admissible as self-speaking instruments of evidence destroys or suppresses them, an inference that they would, if adduced, prejudice his case, may arise.<sup>249</sup> So, if the plaintiff in an action for personal injuries refuses to submit to a physical examination, the jury may reasonably infer that his motive for so doing is the fear that an examination would disclose a condition unfavorable to his case.<sup>250</sup> And the same is true where a party refuses, in the trial of a question of identity, to submit his person to inspection;<sup>251</sup> or where he refuses to permit the adverse party to view a building which concerns the matter in issue.<sup>252</sup>

### § 39. Documents.

Fabrication of documentary evidence raises an unfavorable inference against the party resorting to it;<sup>253</sup> as where a

whose appearance is in question adduces, instead, the testimony of witnesses as to the appearance of the object, his adversary may comment to the jury on that fact. *Rex v. Hunt*, 3 Barn. & Ald. 566, Thayer, Cas. Ev. 730, 731. Consequently, a party will be allowed to account for his failure to produce an instrument of real evidence by showing that the other party has destroyed it. *Com. v. McHugh*, 147 Mass. 401.

<sup>249</sup> *Miller v. People*, 39 Ill. 457. See *Armory v. Delamirie*, 1 Strange, 505; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 307; *Harris v. Rosenberg*, 43 Conn. 227; *Bailey v. Shaw*, 24 N. H. 297, 55 A. D. 241.

<sup>250</sup> *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, 255; *Freeport v. Isbell*, 93 Ill. 381; *Stack v. N. Y., N. H. & H. R. Co.*, 177 Mass. 155, 157, 83 A. S. R. 269, 271; *Shepard v. Mo. Pac. R. Co.*, 85 Mo. 629, 55 A. R. 390, 391. And see *Pa. Co. v. Newmeyer*, 129 Ind. 401, 412; *Roberts v. O. & L. C. R. Co.*, 29 Hun (N. Y.) 154, 157; *Elfers v. Woolley*, 116 N. Y. 294; *Durgin v. Danville*, 47 Vt. 95. See, however, *McArthur v. State*, 59 Ark. 431; *Kinney v. Springfield*, 35 Mo. App. 97.

<sup>251</sup> *Warlick v. White*, 76 N. C. 175, 181 (semble).

<sup>252</sup> *Bryant v. Stilwell*, 24 Pa. 314.

<sup>253</sup> *U. S. v. Randall, Deady*, 524, Fed. Cas. No. 16,118; *The Tillie*, 7 Ben. 382, Fed. Cas. No. 14,048; *Winchell v. Edwards*, 57 Ill. 41; *Murray v. Lepper*, 99 Mich. 135.

person in charge of account books makes false entries in them.<sup>254</sup>

Spoliation of a document warrants an inference that it is unfavorable to the party's case.<sup>255</sup> If, for example, a party defaces or destroys a record as to facts material to his case, an inference may be drawn that the record was unfavorable to his contentions.<sup>256</sup>

Suppression of a document may found an inference that it militates against the case of the party suppressing it;<sup>257</sup> as where a party conceals a will relating to the property rights in suit.<sup>258</sup>

If a party having the burden of adduction withholds documents in his possession, the inference is that they are unfavorable to his contention.<sup>259</sup> Thus, if a party having papers in

<sup>254</sup> Lacey v. Hill, 4 Ch. Div. 537, 543; Pomeroy v. Benton, 77 Mo. 64; State v. Reinhart, 26 Or. 466; Dimond v. Henderson, 47 Wis. 172.

<sup>255</sup> Gray v. Haig, 20 Beav. 219; Dalston v. Coatsworth, 1 P. Wms. 731; The Hunter, 1 Dod. 480; The Pizarro, 2 Wheat. (U. S.) 227; Downing v. Plate, 90 Ill. 268; Gage v. Parmelee, 87 Ill. 329; Love v. Dilley, 64 Md. 238; Bott v. Wood, 56 Miss. 136; State v. Chamberlain, 89 Mo. 129; Drost v. Mueller, 103 Mo. 624; Jones v. Knauss, 31 N. J. Eq. 609; Diehl v. Emig, 65 Pa. 320; Curtis & Co. Mfg. Co. v. Douglass, 79 Tex. 167. See Thompson v. Thompson, 9 Ind. 323, 68 A. D. 638.

This principle is expressed in the maxims, *In odium spoliatoris omnia praesumuntur*, and *Omnia praesumuntur contra spoliatorem*.

<sup>256</sup> The Sam Sloan, 65 Fed. 125; Turner v. Hawkeye Tel. Co., 41 Iowa, 458, 20 A. R. 605, 607; Murray v. Lepper, 99 Mich. 135.

<sup>257</sup> Riggs v. Pa. & N. E. R. Co., 16 Fed. 804; State v. Chamberlain, 89 Mo. 129.

<sup>258</sup> Lucas v. Brooks, 23 La. Ann. 117; In re Lambie's Estate, 97 Mich. 49.

<sup>259</sup> Lowell v. Todd, 15 U. C. C. P. 306; Attorney General v. Halliday, 26 U. C. Q. B. 397; Rector v. Rector, 8 Ill. 105; Eldridge v. Hawley, 115 Mass. 410; State v. Simons, 17 N. H. 83; Cross v. Bell's Adm'rs, 34 N. H. 82; McIntyre v. Ajax Min. Co., 17 Utah, 213.

This inference is strengthened where the party has been duly notified to produce the document. Crescent City Ice Co. v. Ermann, 36 La. Ann. 841.

his possession which directly bear on the title he asserts fails to put them in evidence, the inference is that they militate against his case.<sup>260</sup> So if a party, having the burden of adduction, fails, without explanation, to adduce the best evidence of the fact in dispute, and offers instead evidence of an inferior kind, an inference may be drawn that the superior evidence would operate to his prejudice.<sup>261</sup> And if an instrument is withheld by the adverse party after notice to produce, it is presumed to have borne a stamp, if instruments of that nature are required to be stamped.<sup>262</sup> In some states, however, it is held that mere nonproduction of a document does not justify an unfavorable inference against the party, where he has not been notified to produce it.<sup>263</sup>

#### § 40. Testimony.

Fabrication of testimonial evidence may justify an inference that the truth is unfavorable to the party's case.<sup>264</sup> Thus

<sup>260</sup> *Attorney General v. Dean of Queen's Free Chapel*, 24 Beav. 679; *Roe d. Haldane v. Harvey*, 4 Burrow, 2484; *James v. Blou*, 2 Sim. & S. 600; *Merwin v. Ward*, 15 Conn. 377; *Lee v. Lee*, 9 Pa. 169.

<sup>261</sup> *Runkle v. Burnham*, 153 U. S. 216, 225; *Clifton v. U. S.*, 4 How. (U. S.) 242; *Leese v. Clark*, 29 Cal. 664; *Savannah, F. & W. R. v. Gray*, 77 Ga. 440, 443 (semble); *Davie v. Jones*, 68 Me. 393; *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1, 66 A. D. 308 (semble); *Page v. Stephens*, 23 Mich. 357; *Church v. Church*, 25 Pa. 278. And see *Rex v. Hunt*, 3 Barn. & Ald. 566, *Thayer*, Cas. Ev. 730, 731; *Turner v. Turner*, 79 Cal. 565. This presumption is voiced by statute in some states. *People v. Dole*, 122 Cal. 486, 68 A. S. R. 50; *Mooney v. Holcomb*, 15 Or. 639.

<sup>262</sup> *Crisp v. Anderson*, 1 Starkie, 35.

<sup>263</sup> *Emerson v. Fisk*, 6 Me. 200, 19 A. D. 206, 209; *Tobin v. Shaw*, 45 Me. 331, 71 A. D. 547, 554; *Diel v. Mo. Pac. R. Co.*, 37 Mo. App. 454, 459 (semble); *Watkins v. Pintard*, 1 N. J. Law, 378; *Sullivan v. Cranz*, 21 Tex. Civ. App. 498.

<sup>264</sup> *Charge of the Lord Chief Justice in Reg. v. Castro* (*Tichborne Trial*), I, 813; *Walker v. State*, 49 Ala. 398; *State v. Reed*, 62 Me. 129; *People v. Arnold*, 43 Mich. 303, 38 A. R. 182; *Toler v. State*, 16 Ohio

it may be shown against a party that he attempted to influence the testimony of a witness by an offer of money.<sup>265</sup>

Suppression of testimonial evidence, as by removal or intimidation of a prospective witness, may justify an inference that it is unfavorable to the party's case.<sup>266</sup> For instance, it may be shown against a party that he bribed or attempted to bribe a person acquainted with the facts in dispute to absent himself from the trial.<sup>267</sup>

If a party having the burden of adduction withholds testimonial evidence which, under the circumstances, he might reasonably be expected to produce, an inference is justified that it is unfavorable to him.<sup>268</sup> This rule is instanced by a

St. 583, 585; *Com. v. McMahon*, 145 Pa. 413; *Boyd v. State*, 16 Lea (Tenn.) 149 (semble); *State v. Williams*, 27 Vt. 724; *Dean v. Com.*, 32 Grat. (Va.) 912.

<sup>265</sup> *Moriarty v. London, C. & D. R. Co.*, L. R. 5 Q. B. 314, *Thayer, Cas. Ev.* 114; *Chicago C. R. Co. v. McMahon*, 103 Ill. 485, 42 A. R. 29; *Sater v. State*, 56 Ind. 378 (semble); *Egan v. Bowker*, 5 Allen (Mass.) 449; *Com. v. Sacket*, 22 Pick. (Mass.) 394; *State v. Staples*, 47 N. H. 113, 90 A. D. 565; *Nowack v. M. S. R. Co.*, 166 N. Y. 433, 54 L. R. A. 592; *McHugh v. McHugh*, 186 Pa. 197, 65 A. S. R. 849. Consequently, if a prima facie case of tampering with a witness is made against a party, he may testify in explanation of his conduct. *Lynch v. Coffin*, 131 Mass. 311.

<sup>266</sup> *Annesley's Lessee v. Anglesea*, 17 How. State Tr. 1139, 1217, 1430; *People v. Chin Hane*, 108 Cal. 597; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 A. D. 711; *State v. Barron*, 37 Vt. 57; *Snell v. Bray*, 56 Wis. 156.

<sup>267</sup> *Houser v. Austin*, 2 Idaho, 204, 212; *Chicago C. R. Co. v. McMahon*, 103 Ill. 485, 42 A. R. 29; *Cruikshank v. Gordon*, 118 N. Y. 178; *Carpenter v. Willey*, 65 Vt. 168.

<sup>268</sup> ENGLAND: *Rex v. Burdett*, 4 Barn. & Ald. 95.

UNITED STATES: *The Fred M. Laurence*, 15 Fed. 635; *The Ville Du Havre*, 7 Ben. 328, Fed. Cas. No. 16,943; *Graves v. U. S.*, 150 U. S. 118, 121; *Kirby v. Tallmadge*, 160 U. S. 379.

ALABAMA: *Carter v. Chambers*, 79 Ala. 223, 231.

ARKANSAS: *Fordyce v. McCants*, 55 Ark. 384.

COLORADO: *Little Pittsburg Consol. Min. Co. v. Little Chief Consol. Min. Co.*, 11 Colo. 223, 7 A. S. R. 226, 235.

failure to call or to fully examine a person having knowledge of the facts in dispute;<sup>269</sup> as where, in an action for negligence, the defendant fails to call employes in charge when the accident occurred.<sup>270</sup> So, if the truth or falsity of a disputed fact is known to a party, his omission to take the stand and deny its existence may afford an inference of its truth.<sup>271</sup>

CONNECTICUT: *State v. Hogan*, 67 Conn. 581.

INDIANA: *Hinshaw v. State*, 147 Ind. 334.

IOWA: *State v. Rodman*, 62 Iowa, 456.

MASSACHUSETTS: *Com. v. Clark*, 14 Gray, 367; *Com. v. McCabe*, 163 Mass. 98; *McKim v. Foley*, 170 Mass. 426; *Learned v. Hall*, 133 Mass. 417; *Com. v. Webster*, 5 Cush. 295, 52 A. D. 711.

MICHIGAN: *People v. Mills*, 94 Mich. 630, 638.

NEW YORK: *Gordon v. People*, 33 N. Y. 501.

OREGON: *Wimer v. Smith*, 22 Or. 469, 478.

PENNSYLVANIA: *Frick v. Barbour*, 64 Pa. 120; *Rice v. Com.*, 102 Pa. 408.

WASHINGTON: *Leonard v. Ter.*, 2 Wash. T. 381, 399.

And see *Wood v. Holly Mfg. Co.*, 100 Ala. 326, 46 A. S. R. 56.

<sup>269</sup> *People v. Cline*, 83 Cal. 374; *In re Barber's Estate*, 63 Conn. 393, 22 L. R. A. 90, 95; *People v. Gordon*, 40 Mich. 716; *Grubbs v. N. C. H. Ins. Co.*, 108 N. C. 472, 23 A. S. R. 62; *Crumes v. State*, 28 Tex. App. 516, 19 A. S. R. 853; *Kircher v. M. M. Mut. Ins. Co.*, 74 Wis. 470, 5 L. R. A. 779. And see cases cited in preceding note.

If a party puts a witness on the stand, and in the examination fails to question him as to a material point within his knowledge, the inference is that the witness would testify unfavorably to the party on that point. *Seward v. Garlin*, 33 Vt. 583.

<sup>270</sup> *Gulf, C. & S. F. R. Co. v. Ellis*, 54 Fed. 481; *The Jos. B. Thomas*, 81 Fed. 578; *Western & A. R. Co. v. Morrison*, 102 Ga. 319, 66 A. S. R. 173; *Barnes v. Shreveport City R. Co.*, 47 La. Ann. 1218, 49 A. S. R. 400; *Fonda v. St. P. C. R. Co.*, 71 Minn. 438, 70 A. S. R. 341; *Danner v. S. C. R. Co.*, 4 Rich. Law (S. C.) 329, 55 A. D. 678; *Flannegan v. C. & O. R. Co.*, 40 W. Va. 436, 52 A. S. R. 896.

This inference does not thus arise unless it appears that the employes in question had personal knowledge of the facts. *Peetz v. St. C. St. R. Co.*, 42 La. Ann. 541.

<sup>271</sup> *Tufts v. Hatheway*, 4 Allen (N. B.) 62; *Miller v. Jones*, 32 Ark. 337; *Perkins v. Hitchcock*, 49 Me. 468; *Union Bank v. Stone*, 50 Me. 595, 79 A. D. 631; *Lynch v. Peabody*, 137 Mass. 92; *People v. Swine-*

### § 41. Qualifications of rule.

An unfavorable inference does not arise from the spoliation of evidence, where it occurred through accident or mistake, or necessity or superior force.<sup>272</sup>

The unfavorable inference drawn from the nonproduction of evidence, whether real, documentary, or testimonial, arises only when the necessity of adducing evidence rests upon the party withholding it. If the burden of adduction is on the adverse party, the inference does not arise.<sup>273</sup>

ford, 77 Mich. 573; Hall v. Austin, 73 Minn. 134; Conn. Mut. L. Ins. Co. v. Smith, 117 Mo. 261, 38 A. S. R. 656; Werner v. Litzsinger, 45 Mo. App. 106; In re Randel, 158 N. Y. 216; People v. Dyle, 21 N. Y. 578; Helms v. Green, 105 N. C. 251, 18 A. S. R. 893; Enos v. St. P. F. & M. Ins. Co., 4 S. D. 639, 46 A. S. R. 796. *Contra*, Thompson v. Davitte, 59 Ga. 472, 480 (semble); Lowe v. Massey, 62 Ill. 47. This is true in equity as well as at law. McDonough v. O'Neil, 113 Mass. 92.

An unfavorable inference may arise from a party's absentsing himself from the trial, and so failing to testify. Throckmorton v. Chapman, 65 Conn. 441; Cole v. L. S. & M. S. R. Co., 95 Mich. 77, 81 Mich. 156.

<sup>272</sup> The Pizarro, 2 Wheat. (U. S.) 227, 241 (semble); Bagley v. McMickle's Adm'rs, 9 Cal. 430; The Count Joannes v. Bennett, 5 Allen (Mass.) 173, 81 A. D. 738, 740 (semble).

Destruction of a document pursuant to advice was held excusable in Drosten v. Mueller, 103 Mo. 624. And see Hay v. Peterson, 6 Wyo. 419, 34 L. R. A. 581.

Throwing away the broken parts of a machine was held not to raise a presumption against the party so doing, where he had allowed the other party to inspect them. Williamson v. Rover Cycle Co. [1901] 2 Ir. Rep. 615. And see Hay v. Peterson, *supra*.

<sup>273</sup> Brill v. St. L. Car Co., 80 Fed. 909 (semble); Pollak v. Davidson, 87 Ala. 551, 557; Gage v. Parmelee, 87 Ill. 329 (semble); Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1, 66 A. D. 308; Price v. Phila., W. & B. R. Co., 84 Md. 506, 36 L. R. A. 213; Meagley v. Hoyt, 125 N. Y. 771; Norfolk & W. R. Co. v. Brown, 91 Va. 668, 674 (semble). And see Maddox v. Maddox, 114 Mo. 35, 35 A. S. R. 734.

Thus, no inference of bad character arises from the fact that the accused in a criminal case fails to adduce evidence of good character. State v. Dockstader, 42 Iowa, 436; State v. Upham, 38 Me. 261; Olive

This rule would seem to afford a sure and simple test to determine whether an unfavorable inference may be drawn against a party who refuses to comply with notice to produce a document, or whether his noncompliance merely authorizes the adverse party to prove the contents of the document by secondary evidence. If the burden of adducing evidence upon a given point rests upon a party, and he fails to introduce a document in his possession which bears upon the matter, his failure should give rise to an inference that the document militates against his case;<sup>274</sup> and this should be the rule, even though the adverse party has not notified him to produce the document.<sup>275</sup> If, on the other hand, the burden of adduction does not rest on the party who fails to produce a document relating to the point in dispute, then his failure to offer the instrument in evidence should give rise to no unfavorable inference against him;<sup>276</sup> and this should be so, even though he has been notified to produce the document. The only effect of noncompliance with the notice to produce an instrument which the burden of adduction does not require a party to adduce should be to justify the admission of secondary evidence of the contents of the document.<sup>277</sup>

The failure of a party to testify does not justify an infer-

v. State, 11 Neb. 1; *People v. Bodine*, 1 Denio (N. Y.) 281; *State v. O'Neal*, 29 N. C. (7 Ired.) 251; *Com. v. Weber*, 167 Pa. 153 (semble). And an unfavorable presumption does not arise against defendant because he fails to produce evidence, where plaintiff fails to offer sufficient evidence to take the case to the jury. *Price v. Phila., W. & B. R. Co.*, 84 Md. 506, 36 L. R. A. 213; *Arbuckle v. Templeton*, 65 Vt. 205.

<sup>274</sup> See cases cited in notes 259, 260, *supra*. Cases having a contrary bearing will be found in notes 297, 298, 301, 303, *infra*.

<sup>275</sup> *Contra*, *Watkins v. Pintard*, 1 N. J. Law, 378 (semble).

<sup>276</sup> See cases cited in notes 273, *supra*, and 297, 298, *infra*. Cases tending to the contrary will be found in notes 259, 260, *supra*.

<sup>277</sup> See cases cited in notes 301, 303, *infra*.



ence against him, where he is unavoidably absent.<sup>278</sup> Nor is an unfavorable inference justified by the nonproduction of evidence which is not within the party's control;<sup>279</sup> nor, generally speaking, where the evidence is equally accessible to the adverse party.<sup>280</sup> Neither does it arise where the per-

<sup>278</sup> *Hall v. Austin*, 73 Minn. 134; *Brown v. Barse*, 10 App. Div. (N. Y.) 444 (semble). See *Pollak v. Davidson*, 87 Ala. 551; *Throckmorton v. Chapman*, 65 Conn. 442, 455. Consequently, it may be shown in the trial that the party is unable to attend. *Hall v. Austin*, *supra*.

<sup>279</sup> *Doe d. Gilbert v. Ross*, 7 Mees. & W. 102; *Savannah, F. & W. R. Co. v. Gray*, 77 Ga. 440; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 A. D. 711, 728; *McKim v. Foley*, 170 Mass. 426 (semble); *Com. v. Costello*, 119 Mass. 214; *People v. Sharp*, 107 N. Y. 427, 1 A. S. R. 851, 875; *Hallstead v. Curtis*, 143 Pa. 352, 13 L. R. A. 370; *Weatherford, M. W. & N. W. R. Co. v. Duncan*, 88 Tex. 611. Consequently, a party has ordinarily the right to account for the absence of a material witness or instrument of evidence by showing that he has no control over the same. *State v. Hogan*, 67 Conn. 581; *Com. v. McHugh*, 147 Mass. 401; *Com. v. Costello*, 119 Mass. 214; *Pease v. Smith*, 61 N. Y. 477; *Weatherford, M. W. & N. W. R. Co. v. Duncan*, 88 Tex. 611. But this evidence will not be admitted in a criminal case at the instance of the prosecution, if its tendency is to prejudice the accused, except in answer to evidence offered by the accused. *People v. Sharp*, 107 N. Y. 427, 1 A. S. R. 851, 875.

It seems that the necessity of showing that an absent witness is accessible rests upon the party asking the benefit of the unfavorable inference. *Cross v. L. S. & M. S. R. Co.*, 69 Mich. 363, 13 A. S. R. 399; *People v. Sharp*, 107 N. Y. 427, 1 A. S. R. 851, 875.

<sup>280</sup> *Crawford v. State*, 112 Ala. 1; *Nelms v. Steiner*, 113 Ala. 562; *Scovill v. Baldwin*, 27 Conn. 316; *State v. Cousins*, 58 Iowa, 250; *Donald v. C., B. & Q. R. Co.*, 93 Iowa, 284, 33 L. R. A. 492; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 A. D. 711, 728; *Cross v. L. S. & M. S. R. Co.*, 69 Mich. 363, 13 A. S. R. 399 (semble); *Cole v. L. S. & M. S. R. Co.*, 81 Mich. 156, 161 (semble); *Fonda v. St. P. City R. Co.*, 71 Minn. 438, 70 A. S. R. 341, 350; *Farmers' Bank v. Worthington*, 145 Mo. 91; *Diel v. Mo. Pac. R. Co.*, 37 Mo. App. 454; *State v. Fitzgerald*, 68 Vt. 125. See, however, *Eldridge v. Hawley*, 115 Mass. 410; *Harri-man v. R. & L. St. R. Co.*, 173 Mass. 28; *Wellar v. People*, 30 Mich. 17.

However, a party is not obliged, at the risk of incurring the disadvantage incident to this inference, "to go into the enemy's camp" for

son not called as a witness is clearly prejudiced against the party;<sup>281</sup> nor where the evidence would not be superior to that already adduced, as where the fact in dispute is otherwise fully proved, so that the evidence withheld would be merely corroboratory or cumulative,<sup>282</sup> or where the fact is admitted.<sup>283</sup> An unfavorable presumption is not justified where the evidence withheld would be inadmissible.<sup>284</sup> Thus, a party's failure to testify or to call a certain person as a witness does not operate against him where neither he nor the

evidence. *Western & A. R. Co. v. Morrison*, 102 Ga. 319, 66 A. S. R. 173; *Com. v. McCabe*, 163 Mass. 98 (semble); *Fonda v. St. P. City R. Co.*, 71 Minn. 438, 70 A. S. R. 341, 350; *Robinson v. Woodford*, 37 W. Va. 377. *Contra*, *Lowe v. Massey*, 62 Ill. 47, 49 (semble).

<sup>281</sup> *Coykendall v. Eaton*, 42 How. Pr. (N. Y.) 378. See *Wellar v. People*, 30 Mich. 17. See note 280, *supra*.

<sup>282</sup> *Bates v. Morris*, 101 Ala. 282, 287; *Haynes v. McRae*, 101 Ala. 318; *Carter v. Chambers*, 79 Ala. 223; *Jackson v. State*, 77 Ala. 18; *McGar v. Adams*, 65 Ala. 106; *People v. Dole*, 122 Cal. 486, 68 A. S. R. 50, 57; *Savannah, F. & W. R. v. Gray*, 77 Ga. 440; *Farrand v. Aldrich*, 85 Mich. 593; *Fonda v. St. P. City R. Co.*, 71 Minn. 438, 452, 70 A. S. R. 341, 350.

If the contents of a document are fully proved by secondary evidence, no unfavorable inference can arise from the other party's having failed to produce it. *Saltern v. Melhuish*, 1 Amb. 247, 249; *Cartier v. Troy Lumber Co.*, 138 Ill. 533, 14 L. R. A. 470. Nor can an unfavorable inference be drawn where the contents of a document which a party has wrongfully destroyed are fully proved by secondary evidence. *Bott v. Wood*, 56 Miss. 136; *East Tenn., V. & G. R. Co. v. Kane*, 92 Ga. 187, 22 L. R. A. 315; *Cartier v. Troy Lumber Co.*, *supra*.

<sup>283</sup> *Bleecker v. Johnston*, 69 N. Y. 309; *Mooney v. Holcomb*, 15 Or. 639; *Weeks v. McNulty*, 101 Tenn. 495, 70 A. S. R. 693 (semble).

<sup>284</sup> *Carpenter's Estate v. Bailey*, 94 Cal. 406; *Law v. Woodruff*, 48 Ill. 399; *Com. v. Ryan*, 134 Mass. 223, 225. See, however, *Sutton v. Devonport*, 27 Law J. C. P. 54.

It has been held that, if documents which a party has been notified to produce are not admissible in his own behalf, an unfavorable inference does not arise against him because he refuses to produce them, even though they are admissible in behalf of the other party. *Merwin v. Ward*, 15 Conn. 377; *Cartier v. Troy Lumber Co.*, 138 Ill. 533, 14 L. R. A. 470.

witness has personal knowledge of the matter in question;<sup>285</sup> nor, in some jurisdictions, where the communication to which the witness would testify is privileged.<sup>286</sup> Neither does an unfavorable inference arise from the failure to call as a witness a person who is disqualified to testify as such;<sup>287</sup> nor, in some jurisdictions, where the witness is privileged.<sup>288</sup> So, where one accused of crime exercises his constitutional or statutory privilege of refusing to testify, he is not to be prejudiced thereby.<sup>289</sup>

<sup>285</sup> Pollak v. Davidson, 87 Ala. 551, 557; Savannah, F. & W. R. v. Gray, 77 Ga. 440; Peetz v. St. C. St. R. Co., 42 La. Ann. 541; Hitchcock v. Davis, 87 Mich. 629; Wilson v. St. L. & S. F. R. Co., 108 Mo. 588, 32 A. S. R. 624; Weeks v. McNulty, 101 Tenn. 495, 70 A. S. R. 693.

<sup>286</sup> Wentworth v. Lloyd, 10 H. L. Cas. 589; French v. Deane, 19 Colo. 504, 24 L. R. A. 387, 392; Knowles v. People, 15 Mich. 408; Lane v. S. F. & N. R. Co., 21 Wash. 119, 46 L. R. A. 153. See, however, Throckmorton v. Chapman, 65 Conn. 441. *Contra*, Vergin v. Saginaw, 125 Mich. 499; Cooley v. Foltz, 85 Mich. 47; People v. Hovey, 92 N. Y. 554; Com. v. Weber, 167 Pa. 153.

<sup>287</sup> Graves v. U. S., 150 U. S. 118; Adams v. Main, 3 Ind. App. 232, 50 A. S. R. 266; Cramer v. Burlington, 49 Iowa, 213; Stafford v. Morning Journal Ass'n, 68 Hun (N. Y.) 467; Hoard v. State, 15 Lea (Tenn.) 318.

<sup>288</sup> Millman v. Tucker, Peake Add. Cas. 222; Rose v. Blakemore, Ryan & M. 383; Carne v. Litchfield, 2 Mich. 340; State v. Hatcher, 29 Or. 309; Phellin v. Kenderdine, 20 Pa. 354. *Contra*, Cent. S. & G. Exch. v. Chicago Board of Trade, 196 Ill. 396, 407 (semble); Morgan v. Kendall, 124 Ind. 454, 9 L. R. A. 445; Andrews v. Frye, 104 Mass. 234.

<sup>289</sup> UNITED STATES: Chaffee v. U. S., 18 Wall. 516; Wilson v. U. S., 149 U. S. 60.

CALIFORNIA: People v. Sanders, 114 Cal. 216; People v. Dole, 122 Cal. 486, 68 A. S. R. 50, 57 (semble); People v. Streuber, 121 Cal. 431; People v. Tyler, 36 Cal. 522.

ILLINOIS: Quinn v. People, 123 Ill. 333.

INDIANA: Long v. State, 56 Ind. 182, 26 A. R. 19; Hinshaw v. State, 147 Ind. 334, 367.

IOWA: State v. Baldoser, 88 Iowa, 55.

LOUISIANA: State v. Carr, 25 La. Ann. 407; State v. Johnson, 50 La. Ann. 138.

## § 42. Nature and effect of presumption.

The inference arising from the fabrication, spoliation, suppression, or nonproduction of evidence is usually termed a presumption, but it is not a presumption of law; it is only a presumption of fact in the nature of an implied admission. Consequently it rests with the jury to say whether or not it shall be indulged in a given case,<sup>290</sup> and what weight shall be given it if indulged;<sup>291</sup> and being nothing but a presump-

MICHIGAN: *People v. Seaman*, 107 Mich. 348, 61 A. S. R. 326.

MINNESOTA: *State v. Holmes*, 65 Minn. 230.

MISSISSIPPI: *Reddick v. State*, 72 Miss. 1008.

NEW YORK: *People v. Hayes*, 140 N. Y. 484, 23 L. R. A. 830; *People v. Hoch*, 150 N. Y. 291; *Ruloff v. People*, 45 N. Y. 213.

OHIO: *Calkins v. State*, 18 Ohio St. 366, 98 A. D. 121.

RHODE ISLAND: *State v. Hull*, 18 R. I. 207, 20 L. R. A. 609.

*Contra*, *Reg. v. Rhodes* [1899] 1 Q. B. 77; *State v. Lawrence*, 57 Me. 574; *State v. Cleaves*, 59 Me. 298, 8 A. R. 422; *Parker v. State*, 61 N. J. Law, 308.

If, however, the accused elects to testify, and fails to rebut any criminating fact which it is within his power to rebut, a presumption arises against him in the nature of an implied admission. *Cotton v. State*, 87 Ala. 103; *State v. Glave*, 51 Kan. 330; *Stover v. People*, 56 N. Y. 315. And the same is true where the accused elects to testify, and then refuses to submit to cross-examination. *State v. Ober*, 52 N. H. 459, 13 A. R. 88. See *Taylor v. Com.*, 17 Ky. L. R. 1214, 34 S. W. 227; *Com. v. Mullen*, 97 Mass. 545.

A reference to the fact that an accused, who has failed to testify, has a legal right to take the stand, does not require a reversal of a verdict of conviction if made in good faith for the purpose of illustrating an entirely different matter. *Watt v. People*, 126 Ill. 9, 1 L. R. A. 403.

An attorney proceeded against for disbarment is not privileged from any inference arising from his failure to contradict testimony as to facts within his personal knowledge. *In re Randel*, 158 N. Y. 216.

<sup>290</sup> *Western & A. R. Co. v. Morrison*, 102 Ga. 319, 66 A. S. R. 173, 175; *Thompson v. Davitte*, 59 Ga. 472, 480; *Cartier v. Troy Lumber Co.*, 138 Ill. 533; *Sater v. State*, 56 Ind. 378; *Eldridge v. Hawley*, 115 Mass. 410; *Com. v. Haskell*, 140 Mass. 128; *Boyd v. State*, 16 Lea (Tenn.) 149.

<sup>291</sup> *Fordyce v. McCants*, 55 Ark. 384.

tion of fact,—that is, a mere inference,—it is, of course, rebuttable.<sup>292</sup>

As to the extent to which the fabrication, spoliation, suppression, or nonproduction of evidence shall operate, it is held by the weight of authority that the act throws suspicion on the truth of the party's claim, and thus operates to require a greater weight of evidence to establish his contention than the jury might otherwise require. Involved in this effect of the act is its reverse operation of creating an impression in favor of the truth of the adverse contention of the other party respecting the fact in issue, and so requiring evidence of less weight to support that contention than the jury might otherwise require.<sup>293</sup> The inference, therefore, is a means, and merely a means, of weighing the evidence actually produced with reference to the fact in dispute.<sup>294</sup> It does not dispense with the necessity of adducing evidence, where that necessity otherwise rests on the party in whose favor the inference operates.<sup>295</sup> It has no independent probative effect as to the truth of the matter in dispute, and of itself is not suffi-

<sup>292</sup> *Crisp v. Anderson*, 1 Starkie, 35; *The Pizarro*, 2 Wheat. (U. S.) 227; *Thompson v. Thompson*, 9 Ind. 323, 68 A. D. 638; *Cole v. L. S. & M. S. R. Co.*, 81 Mich. 156; *Drosten v. Mueller*, 103 Mo. 624; *Durgin v. Danville*, 47 Vt. 95; *Hay v. Peterson*, 6 Wyo. 419, 34 L. R. A. 581.

<sup>293</sup> Charge of the Lord Chief Justice in *Reg. v. Castro* (Tichborne Trial) I, 813; *Diel v. Mo. Pac. R. Co.*, 37 Mo. App. 454, 459 (semble); *Werner v. Litzsinger*, 45 Mo. App. 106.

The fabrication of evidence discredits independent evidence adduced by the same party on the same point. *The Tillie*, 7 Ben. 382, Fed. Cas. No. 14,048.

<sup>294</sup> *Fonda v. St. P. City R. Co.*, 71 Minn. 438, 70 A. S. R. 341, 350 (semble). See *Gray v. Haig*, 20 Beav. 219; *Wallace v. Harris*, 32 Mich. 380, 394.

<sup>295</sup> *Gage v. Parmelee*, 87 Ill. 329; *Ellis v. Sanford*, 106 Iowa, 743 (semble); *Donald v. C. B. & Q. R. Co.*, 93 Iowa, 284, 33 L. R. A. 492; *Diel v. Mo. Pac. R. Co.*, 37 Mo. App. 454; *Arbuckle v. Templeton*, 65 Vt. 205. And see *Chaffee v. U. S.*, 18 Wall. (U. S.) 516.

cient evidence to take the case to the jury on that point,—much less does it make a *prima facie* case against the party against whom it operates.<sup>296</sup>

(a) **Effect as to secondary evidence.** In regard to documentary evidence, the inference arising from spoliation, suppression, or nonproduction of a document does not dispense with the necessity of secondary evidence of its contents.<sup>297</sup> Its effect, and its only effect, in this connection, is to aid that species of proof, and thus render the contents of the document susceptible of establishment by slight evidence.<sup>298</sup> The same rule applies in case of the nonproduction of a document which the party has been notified to produce. Accordingly, if the party calling for the document attempts to prove its contents by secondary evidence which is imperfect and vague in detail, or which is contradicted, every inference arising from that evidence is to be taken most strongly against the nonproducing party.<sup>299</sup> And the fact of refusal to produce may be consid-

<sup>296</sup> *Meagley v. Hoyt*, 125 N. Y. 771; *Norfolk & W. R. Co. v. Brown*, 91 Va. 668, 674. See *Woodhull v. Whittle*, 63 Mich. 575. *Contra*, Charge of the Lord Chief Justice in *Reg. v. Castro* (Tichborne Trial) I, 813 (semble); *People v. Swineford*, 77 Mich. 573.

The willful introduction by a party of false testimony is not an admission of the truth of testimony of his adversary's witnesses to the contrary. *Boyd v. State*, 16 Lea (Tenn.) 149.

<sup>297</sup> *Askew v. Odenheimer*, Baldw. 380, 389, Fed. Cas. No. 587; *Connell v. McLoughlin*, 28 Or. 230; *McReynolds v. McCord*, 6 Watts (Pa.) 288. *Contra*, *Dalston v. Coatsworth*, 1 P. Wms. 731; *Bush v. Guion*, 6 La. Ann. 797; *Pomeroy v. Benton*, 77 Mo. 64.

<sup>298</sup> *Hardon v. Hesketh*, 4 Hurl. & N. 175; *Rector v. Rector*, 8 Ill. 105; *Bott v. Wood*, 56 Miss. 136; *Jones v. Knauss*, 31 N. J. Eq. 609; *Connell v. McLoughlin*, 28 Or. 230, 237 (semble); *Frick v. Barbour*, 64 Pa. 120.

Withholding of a document aids evidence of its execution, as well as evidence of its contents. *Benjamin v. Ellinger's Adm'r*, 80 Ky. 472; *In re Lambie's Estate*, 97 Mich. 49.

<sup>299</sup> *Hanson v. Eustace's Lessee*, 2 How. (U. S.) 653, 708 (semble); *Thayer v. Middlesex Mut. F. Ins. Co.*, 10 Pick. (Mass.) 325, 328 (sem-

ered by the jury in weighing the nonproducing party's testimony concerning the matter to which the document relates.<sup>300</sup> Other than this, the refusal to produce a document upon notice gives rise to no inference against the party so refusing.<sup>301</sup> The only effect of his recalcitrancy is to make secondary evidence of its contents competent. It does not dispense with the necessity of secondary evidence; it operates simply in aid of such evidence.<sup>302, 303</sup>

**(b) Attempt to fabricate, spoliage, or suppress evidence.** An unsuccessful attempt to spoliage or suppress evidence must be distinguished from the actual accomplishment of that end. If the attempt is unsuccessful, it can give rise to no inference concerning the substance of the evidence to which the attempt was directed, because, the attempt having failed, that evidence is before the jury, and speaks for itself.<sup>304</sup> Thus, an unsuccessful attempt to spoliage or suppress an article of real evidence or a document can afford no inference either as

ble); *Cross v. Bell*, 34 N. H. 82; *L. & F. Ins. Co. v. Mechanic F. Ins. Co.*, 7 Wend. (N. Y.) 31; *Cahen v. Continental L. Ins. Co.*, 69 N. Y. 300; *Schreyer v. Turner Flouring Mills Co.*, 29 Or. 1. See *Wishart v. Downey*, 15 Serg. & R. (Pa.) 77.

<sup>300</sup> *Davie v. Jones*, 68 Me. 393.

<sup>301</sup> *Cooper v. Gibbons*, 3 Camp. 363; *Lawson v. Sherwood*, 1 Starkie, 314, 2 E. C. L. 124; *Hanson v. Eustace's Lessee*, 2 How. (U. S.) 653; *Cartier v. Troy Lumber Co.*, 138 Ill. 533, 14 L. R. A. 470; *Hunt v. Collins*, 4 Iowa, 56 (semble); *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1, 66 A. D. 308. *Contra*; *Tobin v. Shaw*, 45 Me. 331, 71 A. D. 547.

This is true, at least where the document withheld would not be admissible in behalf of the party failing to produce it, even though the other party has notified him to produce it. *Merwin v. Ward*, 15 Conn. 377.

<sup>302, 303</sup> *Hanson v. Eustace's Lessee*, 2 How. (U. S.) 653; *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1, 66 A. D. 308; *L. & F. Ins. Co. v. Mechanic F. Ins. Co.*, 7 Wend. (N. Y.) 31.

<sup>304</sup> "When the proofs are produced, the presumption is gone." *Brown v. Mitchell*, 102 N. C. 347, 11 A. S. R. 748, 754. And see note 282, *supra*.

to the nature or condition of that article, nor as to the contents of the document, since, by reason of the failure of the attempt, the article or the document is available to the adverse party, and itself constitutes the best evidence of its nature, condition, and contents. The same rule applies to the testimony of a witness whose testimony there has been an attempt to fabricate or suppress. The attempt having failed, there can be no doubt as to the substance or force of that testimony, and there is no room for any inference as to whether it prejudices the case of the party attempting to fabricate or suppress it.

While all this is true, yet the fact that a party attempts to spoliage or suppress evidence, even though he fails of that end, is allowed to go to the jury, to be considered by them in connection with all the evidence, not as bearing on the substance of the evidence sought to be spoliated or suppressed, but seemingly as an implied admission of the party bearing generally on the justice of his case;<sup>305</sup> and attempted fabrication of evidence may be considered to the same end.<sup>306</sup>

#### G. FRAUD, DURESS, AND UNDUE INFLUENCE.

#### § 43. Fraud.

The presumption of innocence applies in cases where actual fraud is the issue. In other words, actual fraud is not presumed, and the burden of establishing it is upon the party who alleges it.<sup>307</sup> This is a principle of frequent application, and a few illustrations may be given.

<sup>305</sup> *Lockwood v. Rose*, 125 Ind. 588; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 A. D. 711; *Com. v. Sullivan*, 156 Mass. 487; *Com. v. Locke*, 145 Mass. 401; *Com. v. Dally*, 133 Mass. 577; *Com. v. Wallace*, 123 Mass. 400; *Com. v. Hall*, 4 Allen (Mass.) 305; *State v. Dickson*, 78 Mo. 438. And see page 160, *supra*.

<sup>306</sup> See pages 159, 160, *supra*.

<sup>307</sup> *London Chartered Bank v. Lempiere*, L. R. 4 P. C. 572; *Gregg*



If, in an action on contract, the defendant would avoid liability because the contract was induced by fraud, he has the burden of establishing that defense.<sup>308</sup>

v. Sayre's Lessee, 8 Pet. (U. S.) 244; Hager v. Thomson, 1 Black (U. S.) 80; Smith v. Yule, 31 Cal. 180, 89 A. D. 167; McCarthy v. White, 21 Cal. 495, 82 A. D. 754; Stewart v. Preston, 1 Fla. 10, 44 A. D. 621; O'Neal v. Boone, 82 Ill. 589; Greenwood v. Lowe, 7 La. Ann. 197; Mandal v. Mandal's Heirs, 28 La. Ann. 556; Nichols v. Patten, 18 Me. 231, 36 A. D. 713; New Portland v. Kingfield, 55 Me. 172; Cannon v. Brush Elec. Co., 96 Md. 446, 94 A. S. R. 584; Hill v. Reifsnider, 46 Md. 555; Hunt v. Chosen Friends, 64 Mich. 671, 8 A. S. R. 855; Och v. Mo., K. & T. R. Co., 130 Mo. 27, 36 L. R. A. 442; Smith v. Oglivie, 127 N. Y. 143; Hewlett v. Hewlett, 4 Edw. Ch. (N. Y.) 7; Caswell v. Jones, 65 Vt. 457, 36 A. S. R. 879; 7 Current Law, 1823.

This presumption is expressed in the maxim, *Odiosa et inhonesta non sunt in lege praesumenda*.

The presumption applies in favor of a will. Davis v. Calvert, 5 Gill & J. (Md.) 269, 25 A. D. 282; King v. King, 19 Ky. L. R. 868, 42 S. W. 347.

The presumption of innocence does not apply to transactions constructively fraudulent. In these the question of good faith is immaterial. Regardless of that, the law attaches to the transaction the same consequences as those which follow actual fraud. The discussion in the text has reference to actual fraud only. Constructive fraud is fully discussed in 2 Pom. Eq. Jur. §§ 922-974.

The presumption of innocence of fraud should be distinguished from the presumptions of legality and of regularity, respectively, which are considered in §§ 23-30, supra, and §§ 55-58, infra.

<sup>308</sup> Ross v. Hunter, 4 Term R. 33, 38; Elkin v. Janson, 13 Mees. & W. 655; Penn Mut. L. Ins. Co. v. Mechanics' S. B. & T. Co., 37 U. S. App. 692, 43 U. S. App. 75, 38 L. R. A. 33; Tidmarsh v. Wash. F. & M. Ins. Co., 4 Mason, 439, Fed. Cas. No. 14,024; Juzan v. Toulmin, 9 Ala. 662, 44 A. D. 448; Towsey v. Shook, 3 Blackf. (Ind.) 267, 25 A. D. 108; Oaks v. Harrison, 24 Iowa, 179; Adams Exp. Co. v. Guthrie, 9 Bush (Ky.) 78; Price v. Gover, 40 Md. 102; Beatty v. Fishel, 100 Mass. 448; Campbell v. N. E. Mut. L. Ins. Co., 98 Mass. 381; Briggs v. Humphrey, 5 Allen (Mass.) 314; Fiske v. N. E. Marine Ins. Co., 15 Pick. (Mass.) 310; Kline v. Baker, 106 Mass. 61; Feldman v. Gamble, 26 N. J. Eq. 494; Flvey v. Pa. R. Co., 67 N. J. Law, 627, 91 A. S. R. 445; Seymour v. Spring Forest Cem. Ass'n, 144 N. Y. 323, 26 L. R. A. 359; N. Y. L. Ins. Co. v. Davis, 96 Va. 737, 44 L. R. A. 305.

In an action to set aside a conveyance as in fraud of creditors, the burden of proving fraud rests on the plaintiff;<sup>309</sup> and having shown a fraudulent intent on the part of the debtor, the plaintiff must in most states also show that the transferee was aware of it.<sup>310</sup> If the conveyance was made to the debtor's wife, however, the presumption of innocence does not arise, and the wife has the burden of showing that the transfer was made in good faith.<sup>311</sup>

The fact that a man is indebted, and that he makes a transfer of property without a valuable consideration, does not conclusively establish fraud as to his creditors.<sup>312</sup> Its

<sup>309</sup> *Jones v. Simpson*, 116 U. S. 609; *Thames v. Rembert's Adm'r*, 63 Ala. 561; *Tompkins v. Nichols*, 53 Ala. 197; *Hempstead v. Johnston*, 18 Ark. 123, 65 A. D. 458; *Excelsior Mfg. Co. v. Owens*, 58 Ark. 556; *Marsh v. Cramer*, 16 Colo. 331; *Bowden v. Bowden*, 75 Ill. 143; *Wallace v. Mattice*, 118 Ind. 59; *Baudin v. Roliff*, 1 Mart. N. S. (La.) 165, 14 A. D. 181; *Bartlett v. Blake*, 37 Me. 124, 58 A. D. 775; *Hatch v. Bayley*, 12 Cush. (Mass.) 27; *Bernheimer v. Rindskopf*, 116 N. Y. 428, 15 A. S. R. 414; *Sabin v. Columbia Fuel Co.*, 25 Or. 15, 42 A. S. R. 756; *Floyd v. Goodwin*, 8 Yerg. (Tenn.) 484, 29 A. D. 130; *Tillman v. Heller*, 78 Tex. 597, 22 A. S. R. 77; *Jackson v. Harby*, 70 Tex. 410; *Williams v. Lord*, 75 Va. 390; *Butler v. Thompson*, 45 W. Va. 660, 72 A. S. R. 838; *Mayers v. Kaiser*, 85 Wis. 382, 21 L. R. A. 623.

The same burden rests on a creditor who opposes an insolvent's discharge. In *re Harris*, 81 Cal. 350. However, a transfer by a debtor to one of his creditors, out of the ordinary course of business, is *prima facie* fraudulent. *Godfrey v. Miller*, 80 Cal. 420.

<sup>310</sup> *Simmons v. Shelton*, 112 Ala. 284, 57 A. S. R. 39; *Smith v. Jensen*, 13 Colo. 213; *Baudin v. Roliff*, 1 Mart. N. S. (La.) 165, 14 A. D. 181 (semble); *Tuteur v. Chase*, 66 Miss. 476, 14 A. S. R. 577 (semble); *Van Raalte v. Harrington*, 101 Mo. 602, 20 A. S. R. 626; *Edwards v. Reid*, 39 Neb. 645, 42 A. S. R. 607 (semble); *Tillman v. Heller*, 78 Tex. 597, 22 A. S. R. 77; *Paul v. Baugh*, 85 Va. 955, 958 (semble). *Contra*, *Richards v. Vaccaro*, 67 Miss. 516, 19 A. S. R. 322; *Weber v. Rothchild*, 15 Or. 385, 3 A. S. R. 162.

<sup>311</sup> *Carson v. Stevens*, 40 Neb. 112, 42 A. S. R. 661; *Stevens v. Carson*, 30 Neb. 544, 9 L. R. A. 523.

<sup>312</sup> *Driggs & Co.'s Bank v. Norwood*, 50 Ark. 42, 7 A. S. R. 78; *Warner v. Dove*, 33 Md. 579; *Lerow v. Wilmarth*, 9 Allen (Mass.)

effect, and its sole effect, is to constitute a *prima facie* case of fraud which may be rebutted by evidence that he retained means ample to satisfy his existing obligations, and readily accessible to his creditors.<sup>313</sup> If this is not shown, the conveyance is void as to existing creditors, even though the debtor acted in good faith.<sup>314</sup> In regard to subsequent creditors, the rule is different. These cannot set aside a voluntary conveyance, even though it comprehends all the debtor's available property, unless he made the transfer for the purpose of defrauding creditors,<sup>315</sup> and the burden of proving this intent lies on them.<sup>316</sup>

382; *Wilson v. Kohlheim*, 46 Miss. 346; *Arnett v. Wanett*, 28 N. C. (6 Ired.) 41. *Contra*, *Wooten v. Steele*, 109 Ala. 563, 55 A. S. R. 947; *Severs v. Dodson*, 53 N. J. Eq. 633, 51 A. S. R. 641; *Annin v. Annin*, 24 N. J. Eq. 184.

The rule is declared by statute in some states. *Pence v. Croan*, 51 Ind. 336; *Holden v. Burnham*, 63 N. Y. 74.

<sup>313</sup> *Pratt v. Curtis*, 2 Lowell, 87, 90, Fed. Cas. No. 11,375; *Emerson v. Bemis*, 69 Ill. 537; *Chase v. McCay*, 21 La. Ann. 195; *Ames v. Dorroh*, 76 Miss. 187, 71 A. S. R. 522; *Gove v. Campbell*, 62 N. H. 401; *Brice v. Myers*, 5 Ohio, 121; *Richardson v. Rhodus*, 14 Rich. Law (S. C.) 95.

The burden of showing that ample means were retained does not rest on the debtor, under the statutes of Indiana. *Pence v. Croan*, 51 Ind. 336.

<sup>314</sup> *Gove v. Campbell*, 62 N. H. 401; *Cole v. Tyler*, 65 N. Y. 73, 78; *Taylor v. Miles*, 19 Or. 550; *Clark v. Depew*, 25 Pa. 509.

Accordingly, if it appears that the debtor was insolvent or embarrassed when he made the conveyance, it is void. *Rudy v. Austin*, 56 Ark. 73, 35 A. S. R. 85; *Driggs & Co.'s Bank v. Norwood*, 50 Ark. 42, 7 A. S. R. 78; *Lowry v. Fisher*, 2 Bush (Ky.) 70, 92 A. D. 475; *Potter v. McDowell*, 31 Mo. 62.

<sup>315</sup> *Mattingly v. Nye*, 8 Wall. (U. S.) 370; *Schreyer v. Scott*, 134 U. S. 405; *Rudy v. Austin*, 56 Ark. 73, 35 A. S. R. 85; *Pratt v. Myers*, 56 Ill. 23; *Lloyd v. Bunce*, 41 Iowa, 660; *Place v. Rhem*, 7 Bush (Ky.) 585; *Richardson v. Rhodus*, 14 Rich. Law (S. C.) 95; *Nicholas v. Ward*, 1 Head (Tenn.) 323; *Lockhard v. Beckley*, 10 W. Va. 37.

<sup>316</sup> *Seals v. Robinson*, 75 Ala. 363; *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 14 A. S. R. 732; *Crawford v. Beard*, 12 Or. 447.

If a transfer is attacked as voluntary, the burden of adducing evidence that it was based upon a valuable and adequate consideration rests on the transferee;<sup>317</sup> and this is especially true where the transfer was made to the debtor's wife.<sup>318</sup> Where stock has been paid for by a conveyance of property to the corporation, or by performance of services, however, and there is no evidence as to the value of the property or services, the presumption is that it was adequate; and even where it appears that there was in fact overvaluation, yet, if the overvaluation was not so gross and palpable as to show that it must have been intentional, it will be presumed that the valuation was honestly made.<sup>319</sup>

<sup>317</sup> *Wooten v. Steele*, 109 Ala. 563, 55 A. S. R. 947; *Roswald v. Hobbie*, 85 Ala. 73, 7 A. S. R. 23; *Mobile Sav. Bank v. McDonnell*, 89 Ala. 434, 18 A. S. R. 137; *Thorington v. Montgomery City Council*, 88 Ala. 548; *Kipp v. Lamoreaux*, 81 Mich. 299; *Richards v. Vaccaro*, 67 Miss. 516, 19 A. S. R. 322; *Weber v. Rothchild*, 15 Or. 385, 3 A. S. R. 162; *Kaine v. Weigley*, 22 Pa. 179; *Tillman v. Heller*, 78 Tex. 597, 22 A. S. R. 77; *Butler v. Thompson*, 45 W. Va. 660, 72 A. S. R. 838.

If an innocent purchaser of goods sold in fraud of creditors gives a note for the price, he is not protected unless the note is negotiable, and the burden of proof is on him to show its negotiability. *Tillman v. Heller*, 78 Tex. 597, 22 A. S. R. 77.

In the case of a mortgage or trust deed the transferee makes a prima facie case of consideration by producing the securities recited in the deed. *Hempstead v. Johnston*, 18 Ark. 123, 65 A. D. 458. A recital of consideration in the deed does not make a prima facie case against the attacking creditor, however. *Butler v. Thompson*, 45 W. Va. 660, 72 A. S. R. 838.

<sup>318</sup> *Rush v. Landers*, 107 La. 549, 57 L. R. A. 353; *Hodges v. Hickey*, 67 Miss. 715; *Adoue v. Spencer*, 62 N. J. Eq. 782, 90 A. S. R. 484; *Brown v. Mitchell*, 102 N. C. 347, 11 A. S. R. 748, 752; *Burt v. Timmons*, 29 W. Va. 441, 6 A. S. R. 664.

It is otherwise by statute in California. *Poulson v. Stanley*, 122 Cal. 655, 68 A. S. R. 73.

<sup>319</sup> 1 *Clark & M. Priv. Corp.* § 392; *Davis v. Montgomery F. & C. Co.*, 101 Ala. 127; *American T. & I. Co. v. Baden Gas Co.*, 165 Pa. 489; *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 45 A. S. R. 700.

The only effect of the presumption of innocence is upon the burden of proof. It does not require that fraud shall be established, if at all, by direct evidence. In the nature of the case, the most common means of proving it is circumstantial evidence, and this means is sanctioned by law.<sup>320</sup>

<sup>320</sup> UNITED STATES: *Rea v. Mo.*, 17 Wall. 532, 543.

ALABAMA: *Thames v. Rembert's Adm'r*, 63 Ala. 561.

CALIFORNIA: *McDaniel v. Baca*, 2 Cal. 326, 56 A. D. 339.

COLORADO: *Marsh v. Cramer*, 16 Colo. 331.

CONNECTICUT: *Morford v. Peck*, 46 Conn. 380.

ILLINOIS: *Reed v. Noxon*, 48 Ill. 323; *Bowden v. Bowden*, 75 Ill. 143.

INDIANA: *De Ruiter v. De Ruiter*, 28 Ind. App. 9, 91 A. S. R. 107.

IOWA: *Turner v. Younker*, 76 Iowa, 258.

KENTUCKY: *Lowry v. Beckner*, 5 B. Mon. 41, 43.

MICHIGAN: *O'Donnell v. Segar*, 25 Mich. 367; *Webber v. Jackson*, 79 Mich. 175, 19 A. S. R. 165.

MISSISSIPPI: *White v. Trotter*, 14 Smedes & M. 30, 53 A. D. 112.

MISSOURI: *Van Raalte v. Harrington*, 101 Mo. 602, 20 A. S. R. 626.

NEVADA: *Tognini v. Kyle*, 15 Nev. 464.

NEW YORK: *Booth v. Bunce*, 33 N. Y. 139, 88 A. D. 372.

NORTH CAROLINA: *Brown v. Mitchell*, 102 N. C. 347, 11 A. S. R. 748.

OREGON: *Lyons v. Leahy*, 15 Or. 8, 3 A. S. R. 133.

PENNSYLVANIA: *Kaine v. Weigley*, 22 Pa. 179; *McMichael v. McDermott*, 17 Pa. 353, 55 A. D. 560.

TENNESSEE: *Floyd v. Goodwin*, 8 Yerg. (Tenn.) 484, 29 A. D. 130.

TEXAS: *Linn v. Wright*, 18 Tex. 317, 70 A. D. 282; *Briscoe v. Bronaugh*, 1 Tex. 326, 46 A. D. 108; *Schmick v. Noel*, 72 Tex. 1; *Burch v. Smith*, 15 Tex. 219, 65 A. D. 154.

"It is said that fraud must be proved, and is never to be presumed. This proposition can be admitted only in a qualified and very limited sense. But it is often urged at the bar, and sometimes assented to by judges, as if it were a fundamental maxim of the law, universally true, incapable of modification, and open to no exception; whereas it has scarcely extent enough to give it the dignity of a general rule, and, so far as it does go, it is based on a principle which has no more application to frauds than to any other subject of judicial inquiry. It amounts but to this: that a contract honest and lawful on its face must be treated as such until it is shown to be otherwise by evidence of some kind, either positive or circumstan-

**§ 44. Duress.**

The presumption of innocence applies in cases where duress is interposed as a defense in an action on contract. The burden of proof, therefore, rests on the defendant, and he must establish the coercion.<sup>321</sup>

**§ 45. Undue influence.**

(a) **Contracts and conveyances.** Ordinarily the burden of proving undue influence as a ground for avoiding a contract or conveyance is on the party who asserts it.<sup>322</sup> The circumstances are often such as to raise a presumption of undue influence, however, in which event the burden of adducing

tial. It is not true that fraud can *never* be presumed. Presumptions are of two kinds, *legal* and *natural*. Allegations of fraud are sometimes supported by one, and sometimes by the other, and are seldom—almost never—sustained by that direct and plenary proof which excludes all presumption. A sale of chattels without delivery or a conveyance of land without consideration is conclusively presumed to be fraudulent as against creditors, not only without proof of any dishonest intent, but in opposition to the most convincing evidence that the motives and objects of the parties were fair. This is an example of fraud established by mere presumption of law. A natural presumption is the deduction of one fact from another. For instance, a person deeply indebted, and on the eve of bankruptcy, makes over his property to a near relative, who is known not to have the means of paying for it. From these facts a jury may infer the fact of a fraudulent intent to hinder and delay creditors. A presumption of fraud is thus created which the party who denies it must repel by clear evidence, or else stand convicted." Per Black, C. J., in *Kaine v. Weigley*, 22 Pa. 179, 183.

<sup>321</sup> *Schwartz v. Schwartz*, 29 Ill. App. 516; *Lewis v. Conrad Seipp Brew. Co.*, 63 Ill. App. 345, 350; *Stanley v. Dunn*, 143 Ind. 495; *Adams Exp. Co. v. Guthrie*, 9 Bush (Ky.) 78; *Feller v. Green*, 26 Mich. 70; *Sternback v. Friedman*, 23 Misc. (N. Y.) 173; *Pflaum v. McClintock*, 130 Pa. 369; *Wilkerson v. Bishop*, 7 Cold. (Tenn.) 24; *Spaulding v. Crawford*, 27 Tex. 155.

<sup>322</sup> *Mallow v. Walker*, 115 Iowa, 238, 91 A. S. R. 158.

Hammon, Ev.—12.

evidence of good faith and fair dealing is cast on the party against whom the charge is made.<sup>323</sup>

— **Relationship of the parties.** The most important instance of the presumption of undue influence is that arising from the peculiar relation in which the parties stood with reference to each other at the time of the transaction in suit. One class of circumstances calculated to raise this presumption appears to be that the party benefited stood in some such relation to the complaining party as to render him peculiarly subject to influence.<sup>324</sup> And if it is once established that a person who stood in a position of commanding influence towards another obtained an advantage from him while in that position, it will be presumed, in the absence of rebutting evidence, that the advantage was obtained by means of that influence; and it is not necessary for the party complaining to show the precise manner in which the influence was exerted, —given a position of general and habitual influence, its exercise in the particular case is presumed.<sup>325</sup> There are many relations from which the court will presume undue influence, but equity has refused to commit itself to a definite enumeration of them. The cases in which relief has been granted, the more important of which will now be considered in detail, are regarded merely as instances of the application of a principle applying to all the variety of relations in which dominion may be exercised by one person over another.<sup>326</sup>

<sup>323</sup> The subject of undue influence, together with the presumptions concerning it, such as those arising from inadequacy of consideration, relationship of the parties, mental and moral weakness, ignorance, improvidence, and distress, are considered in Hammon, Cont. §§ 138-145. As to drunkenness, see Id. § 183.

<sup>324</sup> Hammon, Cont. § 142; Smith v. Kay, 7 H. L. Cas. 750, 779; Green v. Roworth, 113 N. Y. 462.

<sup>325</sup> Hammon, Cont. § 142; Woodbury v. Woodbury, 141 Mass. 329, 55 A. R. 479.

<sup>326</sup> Smith v. Kay, 7 H. L. Cas. 750, 779; Huguenin v. Baseley, 14

— (1) **Family relation.** Where the contracting parties are members of the same family, so that one exercises a substantial preponderance in the family councils, either from age, character, or other circumstance, a presumption arises that the one exercised undue influence over the other in order to obtain the benefits he has received under the contract, and the burden is cast upon the former to show that the transaction was fair and free.<sup>327</sup> This rule is most often illustrated in the case of contracts between parent and child,<sup>328</sup> or guardian and ward,<sup>329</sup> or between persons occupying relations in which there is a power analogous to that of parent or guardian.<sup>330</sup> While a court of equity will not interfere to pre-

Ves. 273, 285; *Shipman v. Furniss*, 69 Ala. 555, 564, 44 A. R. 528; *Todd v. Grove*, 33 Md. 188, 194; *McClure v. Lewis*, 72 Mo. 314; *Haydock v. Haydock's Ex'rs*, 34 N. J. Eq. 570, 574, 38 A. R. 385; *Cowee v. Cornell*, 75 N. Y. 91, 101, 31 A. R. 428; *Deaton v. Munroe*, 57 N. C. (4 Jones Eq.) 39, 41; *Long v. Mulford*, 17 Ohio St. 484, 504, 93 A. D. 638; *Bayliss v. Williams*, 6 Cold. (Tenn.) 440, 442; *Varner v. Carson*, 59 Tex. 303, 307.

<sup>327</sup> *Sisters*. *Harvey v. Mount*, 8 Beav. 439; *Watkins v. Brant*, 46 Wla. 419.

*Brother and sister*. *Million v. Taylor*, 38 Ark. 428; *Thornton v. Ogden*, 32 N. J. Eq. 723; *Sears v. Shafer*, 6 N. Y. 268. See *Odell v. Moss*, 130 Cal. 352.

*Uncle and nephew*. *Hall v. Perkins*, 3 Wend. (N. Y.) 626; *Graham v. Little*, 56 N. C. (3 Jones Eq.) 152.

*Nephew and aunt*. *Cooke v. Lamotte*, 15 Beav. 234.

<sup>328</sup> *Turner v. Collins*, 7 Ch. App. 329; *Jenkins v. Pye*, 12 Pet. (U. S.) 241; *Sayles v. Christie*, 187 Ill. 420; *Williams v. Williams*, 63 Md. 371; *Ashton v. Thompson*, 32 Minn. 25; *Miller v. Simonds*, 72 Mo. 669; *Wood v. Rabe*, 96 N. Y. 414, 48 A. R. 640; *Miskey's Appeal*, 107 Pa. 611. See, however, *Teegarden v. Lewis*, 145 Ind. 98.

<sup>329</sup> *Hatch v. Hatch*, 9 Ves. 292; *Malone v. Kelley*, 54 Ala. 532; *McParland v. Larkin*, 155 Ill. 84; *Ashton v. Thompson*, 32 Minn. 25; *Meek v. Perry*, 36 Miss. 190; *Wade v. Pulsifer*, 54 Vt. 45.

<sup>330</sup> *Higberger v. Stiffer*, 21 Md. 338, 83 A. D. 593; *Berkmeyer v. Kellerman*, 32 Ohio St. 239, 30 A. R. 577.

*Stepfather and stepchild*. *Bradshaw v. Yates*, 67 Mo. 221.



vent an act even of bounty between parent and child, or persons standing in a like relation,<sup>331</sup> yet it will take care that the child is placed in such a position as will enable it to form an entirely free and unfettered judgment, independent of any sort of control.<sup>332</sup>

The presumption of undue influence may arise, not only in favor of the child, but as well in favor of the parent, where, from age, sickness, or other cause, he is placed under the domination of the child.<sup>333</sup> The relation of husband and wife has been held to create a presumption of undue influence upon the part of the man;<sup>334</sup> and the like has been held as to persons engaged to be married,<sup>335</sup> and also as to persons living together as man and wife.<sup>336</sup> The presumption may arise in favor of the man, as well as the woman.<sup>337</sup>

*Grandparent and grandchild.* Brown v. Burbank, 64 Cal. 99.

*Uncle and niece.* Archer v. Hudson, 7 Beav. 551.

*Position analogous to guardianship.* Hemphill v. Holford, 88 Mich. 293.

<sup>331</sup> Archer v. Hudson, 7 Beav. 551, 560; Jenkins v. Pye, 12 Pet. (U. S.) 241.

<sup>332</sup> Archer v. Hudson, 7 Beav. 551, 560.

<sup>333</sup> Highberger v. Stiffer, 21 Md. 338, 83 A. D. 593; Duncombe v. Richards, 46 Mich. 166; Bowe v. Bowe, 42 Mich. 195; Graham v. Burch, 44 Minn. 33; McClure v. Lewis, 72 Mo. 314; Green v. Roworth, 113 N. Y. 462; Smith v. Loafman, 145 Pa. 628; Graves v. White, 4 Baxt. (Tenn.) 38. See Cooke v. Lamotte, 15 Beav. 234; Griffiths v. Robins, 3 Madd. 191; Lanfair v. Thompson, 112 Ga. 487; Oard v. Oard, 59 Ill. 46. See, however, Teegarden v. Lewis, 145 Ind. 98.

<sup>334</sup> Golding v. Golding, 82 Ky. 51; Stiles v. Stiles, 14 Mich. 72; Darlington's Appeal, 86 Pa. 512, 27 A. R. 726. *Contra*, Grigby v. Cox, 1 Ves. Sr. 517; Nedby v. Nedby, 5 De Gex & S. 377; Hardy v. Van Harlingen, 7 Ohio St. 208; Earle v. Chace, 12 R. I. 374.

<sup>335</sup> Cobbett v. Brock, 20 Beav. 524; Page v. Horne, 11 Beav. 227; Rockafellow v. Newcomb, 57 Ill. 186; Pierce v. Pierce, 71 N. Y. 154, 27 A. R. 22; Shea's Appeal, 121 Pa. 302, 1 L. R. A. 422. And see Kline v. Kline, 57 Pa. 130, 98 A. D. 206. *Contra*, Atkins v. Withers, 94 N. C. 581.

<sup>336</sup> Coulson v. Allison, 2 De Gex, F. & J. 521, 524; Shipman v. Fur-

— (2) **Confidential relation.** Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if the confidential relation had not existed.<sup>338</sup> In other words, if a relation of confidence exists between the contracting parties, whether arising out of family ties or otherwise, a presumption of undue influence arises.<sup>339</sup> The most frequently recurring of these relationships, other than the family relation, are those of executors and administrators and persons entitled to a share in the estate,<sup>340</sup> trustee and beneficiary,<sup>341</sup> principal and agent,<sup>342</sup> attorney and client,<sup>343</sup>

niss, 69 Ala. 555, 565, 44 A. R. 528; *Hanna v. Wilcox*, 53 Iowa, 547; *Leighton v. Orr*, 44 Iowa, 679. But see *Farmer v. Farmer*, 1 H. L. Cas. 724, 752; *Marksbury v. Taylor*, 10 Bush (Ky.) 519.

<sup>337</sup> *Shipman v. Furniss*, 69 Ala. 555, 565, 44 A. R. 528; *Rockafellow v. Newcomb*, 57 Ill. 186; *Leighton v. Orr*, 44 Iowa, 679; *Hanna v. Wilcox*, 53 Iowa, 547; *Turner v. Turner*, 44 Mo. 535.

<sup>338</sup> *Tate v. Williamson*, 2 Ch. App. 55, 61.

<sup>339</sup> *Hammon*, Cont. § 142; *Parfitt v. Lawless*, L. R. 2 Prob. & Div. 462, 468; *Odell v. Moss*, 130 Cal. 352; *Street v. Goss*, 62 Mo. 226; *Fisher v. Bishop*, 108 N. Y. 25, 2 A. S. R. 357.

<sup>340</sup> *Cunningham's Appeal*, 122 Pa. 464, 9 A. S. R. 121; *Statham v. Ferguson's Adm'r*, 25 Grat. (Va.) 28.

<sup>341</sup> *Nichols v. McCarthy*, 53 Conn. 299, 55 A. R. 105; *Jones v. Lloyd*, 117 Ill. 597; *Ward v. Armstrong*, 84 Ill. 151; *Smith v. Townshend*, 27 Md. 368, 92 A. D. 637; *Tatum v. McLellan*, 50 Miss. 1; *Spencer & Newbold's Appeal*, 80 Pa. 317; *Clarke v. Deveau*, 1 Rich. (S. C.) 172.

<sup>342</sup> *Burke v. Taylor*, 94 Ala. 530; *Hall v. Knappenberger*, 97 Mo. 509, 10 A. S. R. 337; *Street v. Goss*, 62 Mo. 226; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Hoppin v. Tobey's Ex'rs*, 9 R. I. 42. See *Gillett v. Peppercorne*, 3 Beav. 78; *Jeffries v. Wiester*, 2 Sawy. 135, Fed. Cas.

doctor and patient,<sup>344</sup> and various spiritual relationships,<sup>345</sup> but, as has been said, equity has not attempted to define them, and there are many others.<sup>346</sup>

No. 7,254; *Wilbur v. Lynde*, 49 Cal. 290; *Byrd v. Hughes*, 84 Ill. 174, 25 A. R. 442.

The same rule applies to a transaction between a corporation and a director. *Cumberland C. & I. Co. v. Parish*, 42 Md. 598.

<sup>343</sup> *Gibson v. Jeyes*, 6 Ves. 266; *Yonge v. Hooper*, 73 Ala. 119; *St. Leger's Appeal from Probate*, 34 Conn. 434, 91 A. D. 735; *Jennings v. McConnel*, 17 Ill. 148; *Cassem v. Heustis*, 201 Ill. 208, 94 A. S. R. 160; *Shirk v. Neible*, 156 Ind. 66; *Ryan v. Ashton*, 42 Iowa, 365; *Bingham v. Salene*, 15 Or. 208, 3 A. S. R. 152; *Greenfield's Estate*, 14 Pa. 489; *McMahan v. Smith*, 6 Heisk. (Tenn.) 167. See *Kisling v. Shaw*, 33 Cal. 425, 91 A. D. 644; *Zeigler v. Hughes*, 55 Ill. 288; *Yeamans v. James*, 27 Kan. 195; *Dunn v. Record*, 63 Me. 17; *Merryman v. Euler*, 59 Md. 588, 43 A. R. 564; *Whitehead v. Kennedy*, 69 N. Y. 462.

<sup>344</sup> *Ahearne v. Hogan*, *Drury*, 310; *Dent v. Bennett*, 4 Mylne & C. 269; *Woodbury v. Woodbury*, 141 Mass. 329, 55 A. R. 479; *Cadwallader v. West*, 48 Mo. 483; *Crispell v. Dubois*, 4 Barb. (N. Y.) 393. See *Watson v. Mahan*, 20 Ind. 223. However, there is nothing in the relation of medical adviser and patient that per se forbids the acceptance of a gift to the adviser by the patient. *Audenreid's Appeal*, 89 Pa. 114, 33 A. R. 731. And see *Blackie v. Clark*, 15 Beav. 595.

<sup>345</sup> *Allcard v. Skinner*, 36 Ch. Div. 145; *Huguenin v. Baseley*, 14 Ves. 273; *Nottidge v. Prince*, 2 Giff. 246; *Nachtrieb v. Harmony Settlement*, 3 Wall. Jr. 66, Fed. Cas. No. 10,003; *Drake's Appeal from Probate*, 45 Conn. 9.

*Spiritualist and medium*: *Lyon v. Honie*, L. R. 6 Eq. 655; *Connor v. Stanley*, 72 Cal. 556, 1 A. S. R. 84; *Leighton v. Orr*, 44 Iowa, 679.

*Confessor and penitent*: *Parfitt v. Lawless*, L. R. 2 Prob. & Div. 462, 468; *Dent v. Bennett*, 7 Sim. 539, 546; *Ross v. Conway*, 92 Cal. 632; *Finegan v. Theisen*, 92 Mich. 173; *Ford v. Hennessy*, 70 Mo. 580; *Caspari v. First German Church*, 82 Mo. 649; *Corrigan v. Pironi*, 48 N. J. Eq. 607, 47 N. J. Eq. 135; *Marx v. McGlynn*, 88 N. Y. 357. However, a priest or minister of the gospel is not barred from accepting a gift from a parishioner if it is freely made. *Greenfield's Estate*, 24 Pa. 232.

<sup>346</sup> See page 178, *supra*. The mere relation of master and servant or landlord and boarder does not raise an implication of confidential relationship. *Doran v. McConlogue*, 150 Pa. 98.

— (3) **Termination of relation.** Where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shown in order to determine it. It will not be considered as determined while the influence derived from it can reasonably be supposed to remain.<sup>347</sup> Thus, if the influence had its inception in the legal authority of a parent or guardian, it is presumed to continue for some time after the termination of the legal authority, until there is a complete emancipation of the child, so that a free and unfettered judgment may be formed, independent of any sort of control. And a like rule applies to all other confidential relations, whether arising from the family tie or otherwise.<sup>348</sup>

(b) **Wills.** If a will is contested for undue influence, the proponent bears throughout the trial the burden of proof in the sense of burden of persuading the jury that the will is the free act of the testator.<sup>349</sup> But when he has proved

<sup>347</sup> *Rhodes v. Bate*, 1 Ch. App. 252, 260; *Holman v. Loynes*, 4 De Gex, M. & G. 270, 283; *Taylor v. Taylor*, 8 How. (U. S.) 183; *Ashton v. Thompson*, 32 Minn. 25; *Mason v. Ring*, 3 Abb. Dec. (N. Y.) 210; *Womack v. Austin*, 1 Rich. (S. C.) 421.

After the relationship has terminated, and its influence has ceased to exist, the parties may deal with each other the same as with strangers. *Wickiser v. Cook*, 85 Ill. 68.

A contract made on the advice of counsel twenty months after the trust relation was definitely terminated, is not presumed to have been induced by undue influence. *Banner v. Rosser*, 96 Va. 238.

<sup>348</sup> *Archer v. Hudson*, 7 Beav. 551, 560; *Wright v. Vanderplank*, 8 De Gex, M. & G. 133, 137, 146; *Taylor v. Taylor*, 8 How. (U. S.) 183; *Ferguson v. Lowery*, 54 Ala. 510, 25 A. R. 718; *Noble's Adm'r v. Moses*, 81 Ala. 530, 60 A. R. 175; *Ashton v. Thompson*, 32 Minn. 25; *Miller v. Simonds*, 72 Mo. 669.

<sup>349</sup> *Livingston's Appeal from Probate*, 63 Conn. 68; *Evans v. Arnold*, 52 Ga. 169; *Sheehan v. Kearney* (Miss.) 21 So. 41, 35 L. R. A. 102; *Tingley v. Cowgill*, 48 Mo. 291; 6 Current Law, 1910.

In many states it is held without qualification that the burden of proof as to undue influence rests on the contestant. *Moore v.*

the formal execution of the instrument by the testator as and for his last will, it constitutes a prima facie case of freedom of consent, and the burden of adducing evidence of undue influence shifts to the contestant.<sup>350</sup>

Generally speaking, a presumption of undue influence does not arise from the fact that the sole or principal beneficiary was a member of the same family or household with the testator, or that the natural objects of his bounty or some of them were excluded or discriminated against. While these things, separately or in conjunction, may beget suspicion, they do not, as a rule, make a prima facie case in favor of the contestant.<sup>351</sup> In conjunction with other suspicious circum-

Heineke, 119 Ala. 627; Webber v. Sullivan, 58 Iowa, 260; King v. King, 19 Ky. L. R. 368, 42 S. W. 347; Baldwin v. Parker, 99 Mass. 79, 96 A. D. 697; Bacon v. Bacon, 181 Mass. 18, 92 A. S. R. 397; In re Hess' Will, 48 Minn. 504, 31 A. S. R. 665; Seebrook v. Fedawa, 30 Neb. 424; Tyler v. Gardiner, 35 N. Y. 559, 594; In re Martin's Will, 98 N. Y. 193; Woodward v. James, 3 Strob. Law (S. C.) 552, 51 A. D. 649; McMechen v. McMechen, 17 W. Va. 683, 41 A. R. 682; McMaster v. Scriven, 85 Wis. 162, 39 A. S. R. 828.

<sup>350</sup> Bulger v. Ross, 98 Ala. 267, 271; Thompson v. Davitte, 59 Ga. 472; Sheehan v. Kearney (Miss.) 21 So. 41, 35 L. R. A. 102; Maddox v. Maddox, 114 Mo. 35, 35 A. S. R. 734; McFadin v. Catron, 138 Mo. 197; Greenwood v. Cline, 7 Or. 17; Armstrong v. Armstrong, 63 Wis. 162.

When the contestant adduces evidence of undue influence, the presumption of fairness and freedom of consent arising from formal proof of the will disappears, and the question of undue influence is to be determined by the jury upon all the evidence, without reference to any presumption. Morton v. Heidorn, 135 Mo. 608, 617.

<sup>351</sup> Henry v. Hall, 106 Ala. 84, 54 A. S. R. 22; Eastis v. Montgomery, 95 Ala. 486, 36 A. S. R. 227; Knox v. Knox, 95 Ala. 495, 36 A. S. R. 235; Bundy v. McKnight, 48 Ind. 503; Webber v. Sullivan, 58 Iowa, 260; Sechrest v. Edwards, 4 Metc. (Ky.) 163; In re Hess' Will, 48 Minn. 504, 31 A. S. R. 665; Maddox v. Maddox, 114 Mo. 35, 35 A. S. R. 734, limiting Gay v. Gillilan, 92 Mo. 250, 1 A. S. R. 712; Berberet v. Berberet, 131 Mo. 399, 52 A. S. R. 634; Dale v. Dale, 36 N. J. Eq. 269; Turnure v. Turnure, 35 N. J. Eq. 437; Woodward v. James, 3 Strob. Law (S. C.) 552, 51 A. D. 649; McMaster v. Scriven, 85 Wis. 162, 39 A. S. R. 828.

stances, however, they may effect this result, as where, for example, the beneficiary stood in a fiduciary relation with the testator. Here a presumption of undue influence often arises.<sup>352</sup>

The fact that a will contains a provision in favor of the draughtsman is a suspicious circumstance of more or less weight, according to the facts of the particular case, on the question of undue influence;<sup>353</sup> and if the draughtsman, not

The presumption arises, however, if one member of the family who has complete control over the testator induces him to make a will to her advantage, and to the disadvantage of others who have equal or superior claims upon his bounty. *Carroll v. Hause*, 48 N. J. Eq. 269, 27 A. S. R. 469.

No presumption of undue influence arises from the fact that one spouse makes gifts by will to the other. *Orth v. Orth*, 145 Ind. 184, 57 A. S. R. 185; *Small v. Small*, 4 Me. 220, 16 A. D. 253; *Latham v. Udell*, 38 Mich. 238; *Hughes v. Murtha*, 32 N. J. Eq. 288; *Armstrong v. Armstrong*, 63 Wis. 162. Nor does the presumption arise from the fact that one spouse revokes or changes a previously drawn will to gratify the other. *In re Nelson's Will*, 39 Minn. 204; *Rankin v. Rankin*, 61 Mo. 295. Neither does a presumption arise from the fact that the testator or testatrix makes a gift by will to one with whom he or she is living or has lived in illicit intercourse. *Smith v. Henline*, 174 Ill. 184; *Dickie v. Carter*, 42 Ill. 376; *In re Donnelly's Will*, 68 Iowa, 126; *Porschett v. Porschett*, 82 Ky. 93, 56 A. R. 880; *Sunderland v. Hood*, 84 Mo. 293; *Monroe v. Barclay*, 17 Ohio St. 302, 93 A. D. 620; *Wainwright's Appeal*, 89 Pa. 220; *Rudy v. Ulrich*, 69 Pa. 177, 8 A. R. 238; *Dean v. Negley*, 41 Pa. 312, 80 A. D. 620.

<sup>352</sup> *Moore v. Spier*, 80 Ala. 129; *Meek v. Perry*, 36 Miss. 190; *Bridwell v. Swank*, 84 Mo. 455; *Maddox v. Maddox*, 114 Mo. 35, 35 A. S. R. 734 (semble); *Garvin v. Williams*, 44 Mo. 465, 100 A. D. 314; *Marx v. McGlynn*, 88 N. Y. 357; *Wilson v. Mitchell*, 101 Pa. 495. See, however, *Eastis v. Montgomery*, 93 Ala. 293, 95 Ala. 486, 36 A. S. R. 227. *Contra*, *Brook's Estate*, 54 Cal. 471; *Wheeler v. Whipple*, 44 N. J. Eq. 141.

No presumption of undue influence arises from the fact that the beneficiaries are those who stand nearest the testator in respect and affection, or by reason of intimate social or domestic relations. *Goodbar v. Lidikey*, 136 Ind. 1, 43 A. S. R. 296; *In re Hess' Will*, 48 Minn. 504, 31 A. S. R. 665.

being a relative, stood in a relation of confidence with the testator, a presumption of undue influence may arise.<sup>354</sup>

#### H. HUSBAND AND WIFE.<sup>355</sup>

##### §. 46. Marital coercion.

(a) **Crimes.** If a crime is committed by a married woman in the presence of her husband, and nothing more appears, a presumption of law arises that she acted by his coercion.<sup>356</sup>

<sup>353</sup> *Rusling v. Rusling*, 36 N. J. Eq. 603.

The fact that the draughtsman takes a benefit by the will has a bearing also on the question whether the testator was aware of the contents of the document. See § 52, *infra*.

<sup>354</sup> *Lyons v. Campbell*, 88 Ala. 462; *Richmond's Appeal*, 59 Conn. 226, 21 A. S. R. 85; *Breed v. Pratt*, 18 Pick. (Mass.) 115; *Riddell v. Johnson's Ex'r*, 26 Grat. (Va.) 152.

The presumption arises also where the confidential agent dictates or procures a provision in favor of a member of his family. *Henry v. Hall*, 106 Ala. 84, 54 A. S. R. 22; *In re Barney's Will*, 70 Vt. 352. But it does not arise where the draughtsman and beneficiary was a relative. *Carter v. Dixon*, 69 Ga. 82; *Rusling v. Rusling*, 36 N. J. Eq. 603; *Waddington v. Buzby*, 45 N. J. Eq. 173; *Nexsen v. Nexsen*, 3 Abb. Dec. (N. Y.) 360; *Coffin v. Coffin*, 23 N. Y. 9. *Contra*, *Bush v. Delano*, 113 Mich. 321.

The presumption will not be indulged in an action to set aside the probate of a will. In such a case the plaintiff must adduce evidence of undue influence independent of the mere fact of the relation of confidence. *Post v. Mason*, 91 N. Y. 539, 43 A. R. 689.

It has been said that the presumption arising from the fact that a beneficiary under a will draughted the instrument is one of fraud, and not of undue influence, unless it appears that he stood in a relation of confidence with the testator, in which case a presumption of undue influence may arise. *Henry v. Hall*, 106 Ala. 84, 54 A. S. R. 22.

<sup>355</sup> Presumption of marriage arising from cohabitation, see § 58(b), *infra*. Presumption of divorce, see § 35, *supra*. Presumption of death of spouse, see § 62(c), *infra*. Presumption of regularity of ceremonial marriage, see § 29, *supra*. Presumptions affecting parent and child, see §§ 70-73, *infra*.

<sup>356</sup> Marital coercion, whether actual or presumed, is an affirmative defense. Consequently, an indictment of a married woman need not negative the fact of coercion. *State v. Nelson*, 29 Me. 329; *Long, Dom. Rel.* 263.

This presumption was at one time a conclusive one, and evidence was not admissible to show that the wife acted of her own free will. At the present day, however, the presumption is disputable, and if evidence is introduced which tends to show that she was the prime mover or a willing participator in the crime, the question of coercion is for the jury.<sup>357</sup>

In the beginning, this presumption was doubtless applied to all crimes alike, but in some jurisdictions the later cases have engrafted exceptions to the general rule. These are professedly based on the nature, grade, and heinousness of the felony, but the exact line of separation is not settled. The cases are grouped in the note according to offense.<sup>358</sup>

A married woman who urges marital coercion as a defense is entitled to have the presumption stated to the jury if the evidence makes it applicable. *Com. v. Eagan*, 103 Mass. 71.

<sup>357</sup> *Rex v. Hughes*, 2 Lewin Cr. Cas. 229; *Reg. v. Torpey*, 12 Cox Cr. Cas. 45; *State v. Cleaves*, 59 Me. 298, 8 A. R. 422; *Com. v. Hopkins*, 133 Mass. 381; *Com. v. Moore*, 162 Mass. 441; *Com. v. Eagan*, 103 Mass. 71; *Com. v. Daley*, 148 Mass. 11; *Com. v. Gormley*, 133 Mass. 580; *People v. Wright*, 38 Mich. 744, 31 A. R. 331; *State v. Ma Foo*, 110 Mo. 7, 33 A. S. R. 414; *Goldstein v. People*, 82 N. Y. 231; *Seller v. People*, 77 N. Y. 411; *State v. Williams*, 65 N. C. 398; *Tabler v. State*, 34 Ohio St. 127; *State v. Shee*, 13 R. I. 535; *State v. Parkerson*, 1 Strobl. Law (S. C.) 169; *Uhl v. Com.*, 6 Grat. (Va.) 706; *Miller v. State*, 25 Wis. 384; *Long*, Dom. Rel. 264.

To dispel the presumption of coercion, the state is not bound to show that the husband disapproved of the crime; it is enough to show that he did not incite it or aid in its commission. *State v. Ma Foo*, 110 Mo. 7, 33 A. S. R. 414.

<sup>358</sup> The presumption of coercion applies in the following cases, viz.:

*Arson.* *Davis v. State*, 15 Ohio, 72, 45 A. D. 559.

*Assault and battery.* *Com. v. Neal*, 10 Mass. 152, 6 A. D. 105 (semble); *Com. v. Eagan*, 103 Mass. 71; *State v. Williams*, 65 N. C. 398; *State v. Parkerson*, 1 Strobl. Law (S. C.) 169.

*Burglary.* *J. Kelyng*, 31; *Com. v. Trimmer*, 1 Mass. 476.

*Counterfeiting.* *Connolly's Case*, 2 Lewin, Cr. Cas. 229; *Rex v. Price*, 8 Car. & P. 19.

*Criminal duress.* *Reg. v. John*, 13 Cox Cr. Cas. 100.

*Having burglar's tools.* *State v. Potter*, 42 Vt. 495.



Generally speaking, the husband's presence at the time the crime is committed is a necessary element of the basis of the presumption;<sup>359</sup> and this is true, even where the wife commits the crime by his advice.<sup>360</sup> It is not necessary, however, that the husband should have been actually present. It is enough if he was so near as to exercise a controlling influence over the wife's will.<sup>361</sup> Thus it has been held that the presumption

*Intoxicating liquor offenses.* Hensly v. State, 52 Ala. 10; State v. Fertig, 98 Iowa, 139; State v. Cleaves, 59 Me. 298, 8 A. R. 422 (semble); Com. v. Burk, 11 Gray (Mass.) 437; Com. v. Pratt, 126 Mass. 462; State v. Boyle, 13 R. I. 537.

*Keeping bawdy house.* Com. v. Wood, 97 Mass. 225; Com. v. Hill, 145 Mass. 305.

*Keeping gambling house.* Com. v. Hill, 145 Mass. 305. *Contra*, Rex v. Dixon, 10 Mod. 335.

*Larceny.* Rex v. Knight, 1 Car. & P. 116.

*Receiving stolen goods.* Reg. v. Matthews, 1 Denison Cr. Cas. 596.

*Robbery.* Reg. v. Torpey, 12 Cox Cr. Cas. 45; People v. Wright, 38 Mich. 744, 31 A. R. 331 (semble).

The presumption does not apply in the following cases, viz.:

*Murder.* Bibb v. State, 94 Ala. 31, 33 A. S. R. 88; State v. Barnes, 48 La. Ann. 460; State v. Ma Foo, 110 Mo. 7, 33 A. S. R. 414. *Contra*, State v. Kelly, 74 Iowa, 589.

*Perjury.* Smith v. Meyers, 54 Neb. 1.- And see Com. v. Moore, 162 Mass. 441.

*Treason.* Hamilton's Case, 4 Cobb. State Tr. 1155, 1169; State v. Ma Foo, 110 Mo. 7, 33 A. S. R. 414 (semble).

*Quaere*, whether the presumption of marital coercion applies to crimes defined by act of congress. U. S. v. De Quilfeldt, 2 Cr. Law Mag. & Rep. 211.

<sup>359</sup> Rex v. Hughes, 2 Lewin C. C. 229; Reg. v. John, 13 Cox Cr. Cas. 100, 107; Pennybaker v. State, 2 Blackf. (Ind.) 484; Com. v. Murphy, 2 Gray (Mass.) 510; Com. v. Welch, 97 Mass. 593; State v. Baker, 71 Mo. 475; State v. Collins, 1 McCord (S. C.) 355.

<sup>360</sup> Rex v. Morris, Russ. & R. 270; Com. v. Feeney, 13 Allen (Mass.) 560; Com. v. Butler, 1 Allen (Mass.) 4; State v. Haines, 35 N. H. 207; Sellar v. People, 77 N. Y. 411; State v. Potter, 42 Vt. 495.

<sup>361</sup> Connolly's Case, 2 Lewin Cr. Cas. 229; Com. v. Munsey, 112 Mass. 287; Com. v. Daley, 148 Mass. 11; Com. v. Flaherty, 140 Mass. 454. In apparent conflict with this it has been held that mere proximity of

may arise where the husband was in the room adjoining that in which the wife committed the crime.<sup>362</sup> The presumption applies in favor of the wife if the crime is begun by the husband's advice, and completed in his presence, even though intermediate acts necessary to the commission of the offense are done by the wife in his absence. This rule is illustrated by cases wherein the wife, at the husband's request, conveys weapons or other implements into the jail where he is confined to aid him in an escape. In a trial of the wife for the offense, the presumption of coercion has been held to apply.<sup>363</sup>

The presumption of coercion operates not only in favor of the wife, but also against the husband. The consequence is, therefore, that the wife is excused from liability for the act so done, while the husband, on the other hand, is held responsible for it.<sup>364</sup>

(b) **Torts.** A like presumption arises with like effect in case a tort is committed by the wife in the presence of the husband. At common law, the husband is liable for the wife's torts, whether committed in or out of his presence, and whether or not she acted by his direction. The wife also is liable for torts having no connection with contract, unless the husband was both present and directed the doing of it at the time of commission; and a presumption of coercion arises where the tort was done by her in his presence.<sup>365</sup> To raise

the husband does not raise the presumption. *Seiler v. People*, 77 N. Y. 411; *State v. Shee*, 13 R. I. 535.

<sup>362</sup> *State v. Fertig*, 98 Iowa, 139; *Com. v. Burk*, 11 Gray (Mass.) 437.

<sup>363</sup> *Ryan's Case*, 1 Car. & P. 117, note; *State v. Miller*, 162 Mo. 253, 85 A. S. R. 498.

<sup>364</sup> *Hensly v. State*, 52 Ala. 10; *Mulvey v. State*, 43 Ala. 316, 94 A. D. 684; *Com. v. Hill*, 145 Mass. 305, 307; *Com. v. Pratt*, 126 Mass. 462; *State v. Boyle*, 13 R. I. 537.

<sup>365</sup> *Strouse v. Leipf*, 101 Ala. 433, 46 A. S. R. 122; *Kosminsky v. Goldberg*, 44 Ark. 401; *Curd v. Dodds*, 6 Bush (Ky.) 681; *Marshall v.*

this presumption in cases of tort, as in cases of crime, the wrongful act must have been done in the presence, actual or constructive, of the husband. It is not enough that the husband had directed the wife to do the act.<sup>366</sup> And the presumption is rebuttable by evidence that the wife acted of her own accord.<sup>367</sup>

(c) **Modern statutes.** This rule of presumption has been severely criticised as being unsuited to the present state of society, in view of the rights given to married women by statute, and the diminished power of control which by law and usage husbands now have over the persons and property of their wives. However this may be, the rule has not, generally speaking, been abrogated or modified by the married women's acts, with reference either to crimes<sup>368</sup> or to torts.<sup>369</sup> In some

Oakes, 51 Me. 308; Warner v. Moran, 60 Me. 227; Nolan v. Traber, 49 Md. 460, 33 A. R. 277, 279; Brazil v. Moran, 8 Minn. 236, 83 A. D. 772; Flesh v. Lindsey, 115 Mo. 1, 14, 37 A. S. R. 374, 380; Carleton v. Haywood, 49 N. H. 314; Hildreth v. Camp, 41 N. J. Law, 306; Cassin v. Delany, 38 N. Y. 178; Sisco v. Cheeney, Wright (Ohio) 9; Appeal of Franklin's Adm'r, 115 Pa. 534, 2 A. S. R. 583; Wheeler & W. Mfg. Co. v. Hell, 115 Pa. 487, 2 A. S. R. 575; McKeown v. Johnson, 1 McCord (S. C.) 578, 10 A. D. 698; Culmer v. Wilson, 13 Utah, 129, 145, 57 A. S. R. 713, 721 (semble); Long, Dom. Rel. 260.

<sup>366</sup> Heckle v. Lurvey, 101 Mass. 344, 3 A. R. 366; Handy v. Foley, 121 Mass. 259, 23 A. R. 270; Hildreth v. Camp, 41 N. J. Law, 306; Wheeler & W. Mfg. Co. v. Hell, 115 Pa. 487, 2 A. S. R. 575; Appeal of Franklin's Adm'r, 115 Pa. 534, 2 A. S. R. 583; Gill v. State, 39 W. Va. 479, 485, 45 A. S. R. 928, 934; Long, Dom. Rel. 260.

<sup>367</sup> Kosminsky v. Goldberg, 44 Ark. 401; Warner v. Moran, 60 Me. 227; Ferguson v. Brooks, 67 Me. 251; Marshall v. Oakes, 51 Me. 308; Nolan v. Traber, 49 Md. 460, 33 A. R. 277, 280 (semble); Miller v. Sweitzer, 22 Mich. 391; Brazil v. Moran, 8 Minn. 236, 83 A. D. 772; Carleton v. Haywood, 49 N. H. 314; Hildreth v. Camp, 41 N. J. Law, 306; Cassin v. Delany, 38 N. Y. 178; Wheeler & W. Mfg. Co. v. Hell, 115 Pa. 487, 2 A. S. R. 575; Appeal of Franklin's Adm'r, 115 Pa. 534, 2 A. S. R. 583; Gill v. State, 39 W. Va. 479, 485, 45 A. S. R. 928, 934 (semble); Long, Dom. Rel. 260.

<sup>368</sup> Com. v. Gannon, 97 Mass. 547. *Contra*, City Council v. Van Roven,

states, however, it has been expressly done away with by statute.<sup>370</sup>

§ 47. Agency.

(a) **Care of absentee's property.** Under some circumstances the wife is presumed to be the agent of the husband. Thus, if he absents himself from home, she is presumed to have authority to do all necessary acts for the care, protection, and management of such of his property as he has left in her possession, the extent of the agency depending upon the circumstances of the particular case.<sup>371</sup>

Whether the circumstances are such as to give the wife authority to protect or manage the husband's property in his absence is a question of fact in the particular case; and so far as third persons are concerned, it is immaterial to the inquiry that the husband, before he left, expressly forbade the wife to act in his behalf. The so-called presumption of agency may therefore be regarded in two lights: First, as a presumption of fact, so far as concerns the question whether the circumstances created a necessity for the wife's acting in the husband's behalf; second, assuming that necessity to exist, the presumption is a conclusive presumption of law,

2 McCord (S. C.) 465. Thus, the husband still has legal control of the domicile, and, accordingly, if the wife makes an illegal use of it in the husband's presence, the presumption of coercion applies, and she is excused. *Com. v. Wood*, 97 Mass. 225; *Com. v. Barry*, 115 Mass. 146; *Com. v. Kennedy*, 119 Mass. 211; *Com. v. Carroll*, 124 Mass. 30.

<sup>369</sup> *Strouse v. Leipf*, 101 Ala. 433, 46 A. S. R. 122. *Contra*, *Peak v. Lemon*, 1 Lans. (N. Y.) 295.

<sup>370</sup> *Crimes*. *Edwards v. State*, 27 Ark. 493; *Freel v. State*, 21 Ark. 212; *Bell v. State*, 92 Ga. 49.

*Torts*. *Blakeslee v. Tyler*, 55 Conn. 397.

<sup>371</sup> 1 Bishop, Mar., Div. & Sep. §§ 1206-1212; *Church v. Landers*, 10 Wend. (N. Y.) 79; *Felker v. Emerson*, 16 Vt. 653, 42 A. D. 532. And see *Benjamin v. Benjamin*, 15 Conn. 347, 39 A. D. 384; *Casteel v. Casteel*, 8 Blackf. (Ind.) 240, 44 A. D. 763; 1 Clark & S. Agency, 202.

so far as the question of agency in fact is concerned,—that is, the question of actual agency is immaterial, as against third persons, if a necessity for the wife's acting in his behalf existed.

(b) **Family necessities.** The wife is also presumed, under some circumstances, to have authority to bind the husband for family necessities.<sup>372</sup> This presumption, however, does not prevail where the husband has not refused or neglected to maintain the wife;<sup>373</sup> nor does it arise where the spouses are dwelling apart,<sup>374</sup> unless she has left him with his consent,<sup>375</sup> or for justifiable cause,<sup>376</sup> or he has wrongfully abandoned

<sup>372</sup> *Montague v. Benedict*, 3 Barn. & C. 631 (semble); *Rea v. Durkee*, 25 Ill. 503; *Baker v. Carter*, 83 Me. 132, 23 A. S. R. 764; *Bergh v. Warner*, 47 Minn. 250, 28 A. S. R. 362; *Morrison v. Holt*, 42 N. H. 478, 80 A. D. 120; *Vusler v. Cox*, 53 N. J. Law, 516; *Moore v. Copley*, 165 Pa. 294, 44 A. S. R. 664; 1 Clark & S. Agency, 205.

<sup>373</sup> *Holt v. Brien*, 4 Barn. & Ald. 252; *Rea v. Durkee*, 25 Ill. 503; *Baker v. Carter*, 83 Me. 132, 23 A. S. R. 764; *Bergh v. Warner*, 47 Minn. 250, 28 A. S. R. 362; *Baker v. Barney*, 8 Johns. (N. Y.) 72, 5 A. D. 326.

<sup>374</sup> *Mitchell v. Treanor*, 11 Ga. 324, 56 A. D. 421; *Rea v. Durkee*, 25 Ill. 503; *Olson v. Heritage*, 45 Ind. 73, 15 A. R. 258; *Hartmann v. Tegart*, 12 Kan. 177; *Billings v. Pilcher*, 7 B. Mon. (Ky.) 458, 46 A. D. 523; *Belknap v. Stewart*, 38 Neb. 304, 41 A. S. R. 729; *Vusler v. Cox*, 53 N. J. Law, 516; *McCutchen v. McGahay*, 11 Johns. (N. Y.) 281, 6 A. D. 373; *Walker v. Simpson*, 7 Watts & S. (Pa.) 83, 42 A. D. 216; *Brown v. Mudgett*, 40 Vt. 68; *Sturtevant v. Starin*, 19 Wis. 268.

<sup>375</sup> *Pearson v. Darrington*, 32 Ala. 227; *Ross v. Ross*, 69 Ill. 569; *Belknap v. Stewart*, 38 Neb. 304, 41 A. S. R. 729; *Vusler v. Cox*, 53 N. J. Law, 516; *Baker v. Barney*, 8 Johns. (N. Y.) 72, 5 A. D. 326.

<sup>376</sup> *Zeigler v. David*, 23 Ala. 127; *Ross v. Ross*, 69 Ill. 569; *Mitchell v. Treanor*, 11 Ga. 324, 56 A. D. 421; *Billings v. Pilcher*, 7 B. Mon. (Ky.) 458, 46 A. D. 523; *Belknap v. Stewart*, 38 Neb. 304, 41 A. S. R. 729; *Allen v. Aldrich*, 29 N. H. 63; *Vusler v. Cox*, 53 N. J. Law, 516; *Sturtevant v. Starin*, 19 Wis. 268.

The presumption may arise where the husband refuses to let the wife live with him. *Cartwright v. Bate*, 1 Allen (Mass.) 514, 79 A. D. 759; *Allen v. Aldrich*, 29 N. H. 63; *McCutchen v. McGahay*, 11 Johns. (N. Y.) 281, 6 A. D. 373; *Cunningham v. Irwin*, 7 Serg. & R.

her,<sup>377</sup> and no decree for alimony has been passed<sup>378</sup> before the necessities are furnished.<sup>379</sup>

To render the husband liable for his wife's necessities, they must have been furnished on his credit. If they were supplied on the credit of the wife's separate estate, or on the credit of a third person, the husband is not liable.<sup>380</sup>

The so-called presumption of agency arising from the husband's refusal or neglect to provide the wife with the necessities of life is a conclusive presumption of law, not a true presumption, and is simply an indirect expression of the rule of law that, under the circumstances prescribed, the husband is liable for necessities furnished the wife. The agency in such cases is not a matter of inference; nor, on the other hand, is evidence admissible to disprove it. Agency in fact is immaterial, as is shown by the rule that the husband's liability is not affected by the fact that he has given orders that the wife's needs shall not be supplied.<sup>381</sup> The husband's liability is quasi contractual, the same as that of a parent to whose minor child necessities are furnished upon his own failure to do so.<sup>382</sup>

#### I. IDENTITY.

§ 48. If several acts are shown, and the actor in each bears the same name, the agreement of name may give rise

(Pa.) 247, 10 A. D. 458; *Hultz v. Gibbs*, 66 Pa. 360. But not if she has adequate means of support. *Hunt v. Hayes*, 64 Vt. 89, 33 A. S. R. 917.

<sup>377</sup> *Kenyon v. Farris*, 47 Conn. 510, 36 A. R. 86; *Carstens v. Hanselman*, 61 Mich. 426, 1 A. S. R. 606; *Allen v. Aldrich*, 29 N. H. 63.

<sup>378</sup> *Bennett v. O'Fallon*, 2 Mo. 69, 22 A. D. 440; *Hare v. Gibson*, 32 Ohio St. 33, 30 A. R. 568.

<sup>379</sup> *Mitchell v. Treanor*, 11 Ga. 324, 56 A. D. 421.

<sup>380</sup> *Pearson v. Darrington*, 32 Ala. 227; *Mitchell v. Treanor*, 11 Ga. 324, 56 A. D. 421; *Moses v. Fogartie*, 2 Hill (S. C.) 335; *Carter v. Howard*, 39 Vt. 106. *Contra*, *Furlong v. Hysom*, 35 Me. 332; *Moore v. Copley*, 165 Pa. 294, 44 A. S. R. 664.

<sup>381</sup> *Morrison v. Holt*, 42 N. H. 478, 80 A. D. 120.

<sup>382</sup> See *Hammon*, Cont. § 23; 1 Clark & S. Agency, 209.

*Hammon*, Ev.—13.

to a presumption that they are one and the same person. In other words, identity of name may create a presumption of identity of person. In some cases this presumption may be regarded as nothing more than one of fact,—a mere inference of identity;<sup>383</sup> and even as such it is often disallowed.<sup>384</sup> In most jurisdictions, however, a true presumption of identity of person arises from identity of name,—time and place of existence permitting.<sup>385</sup> This presumption is not conclusive,

<sup>383</sup> *Bond.* Cobb v. Haynes, 8 B. Mon. (Ky.) 137.

*Deed.* Summer v. Mitchell, 29 Fla. 179, 30 A. S. R. 106 (semble); Brown v. Metz, 33 Ill. 339, 85 A. D. 277; Gilman v. Sheets, 78 Iowa, 499; Cates v. Loftus, 3 A. K. Marsh. (Ky.) 202.

*Judgment.* Reg. v. Levy, 8 Cox Cr. Cas. 73; Campbell v. Wallace, 46 Mich. 320.

*Negotiable instrument.* Sewell v. Evans, 4 Q. B. 626.

*Patent for land.* Leland v. Eckert, 81 Tex. 226.

<sup>384</sup> *Bond.* Middleton v. Sandford, 4 Camp. 34; Jackson v. Christman, 4 Wend. (N. Y.) 277.

*Deed.* Hoyt v. Newbold, 45 N. J. Law, 219, 46 A. R. 757; Kinney v. Flynn, 2 R. I. 319.

*Negotiable instrument.* Whitelocke v. Musgrove, 1 Crompt. & M. 511.

*Public record.* Smith v. Fuge, 3 Camp. 456; Barber v. Holmes, 3 Esp. 190; Wedgwood's Case, 8 Me. 75; Morrissey v. Wiggins Ferry Co., 47 Mo. 521.

<sup>385</sup> Daby v. Ericsson, 45 N. Y. 786.

*Deed.* Stebbins v. Duncan, 108 U. S. 32; Lee v. Murphy, 119 Cal. 364; Scott v. Hyde, 21 D. C. 531 (semble); Morris v. McClary, 43 Minn. 346; Flournoy v. Warden, 17 Mo. 435; Rupert v. Penner, 35 Neb. 587, 17 L. R. A. 824; Sitler v. Gehr, 105 Pa. 577, 51 A. R. 207, 218 (semble); Smith v. Gillum, 80 Tex. 120; Cross v. Martin, 46 Vt. 14.

*Judgment.* People v. Rolfe, 61 Cal. 540; Douglas v. Dakin, 46 Cal. 50; Aultman v. Timm, 93 Ind. 158; Bayha v. Mumford, 58 Kan. 445; Gitt v. Watson, 18 Mo. 274; State v. Kelsoe, 76 Mo. 505; State v. McGuire, 87 Mo. 642; Green v. Heritage, 63 N. J. Law, 455; Ritchie v. Carpenter, 2 Wash. St. 512, 26 A. S. R. 877.

*Land patent.* Geer v. M. L. & M. Co., 134 Mo. 85, 56 A. S. R. 489; Jackson v. Goes, 13 Johns. (N. Y.) 518, 7 A. D. 399 (semble); Jackson v. King, 5 Cow. (N. Y.) 237, 15 A. D. 468; Robertson v. Du Bose, 76 Tex. 1.

*Marriage record.* State v. Moore, 61 Mo. 276.

but disputable, and constitutes, accordingly, nothing more than a *prima facie* case of identity which may be rebutted.<sup>386</sup>

The presumption depends to a great extent upon whether the name is common or unusual,<sup>387</sup> upon the population of the place where the persons lived who are sought to be identified as one,<sup>388</sup> and upon the time when they are shown to have lived.<sup>389</sup> To justify the presumption, according to some cases, it is not enough that the surname and the initials of the Christian name or names are the same; the full name must be identical.<sup>390</sup>

*Negotiable instrument.* McConeghy v. Kirk, 68 Pa. 203.

*Pleading.* Hennell v. Lyon, 1 Barn. & Ald. 182; Filkins v. O'Sullivan, 79 Ill. 524; Sweetland v. Porter, 43 W. Va. 189.

*Process.* Givens v. Tidmore, 8 Ala. 745.

*Statute.* Wilson v. Holt, 83 Ala. 528, 3 A. S. R. 768.

*Will.* Williams' Estate, 128 Cal. 552, 79 A. S. R. 67; Goodell v. Hibbard, 32 Mich. 47.

<sup>386</sup> Wilson v. Holt, 83 Ala. 528, 3 A. S. R. 768; Givens v. Tidmore, 8 Ala. 745; *In re Williams' Estate*, 128 Cal. 552, 555, 79 A. S. R. 67, 69; Aultman v. Timm, 93 Ind. 158; Allin v. Shadburne's Ex'r, 1 Dana (Ky.) 68, 25 A. D. 121; Morris v. McClary, 43 Minn. 346; Cozzens v. Gillispie, 4 Mo. 82 (semble); Jackson v. Goes, 13 Johns. (N. Y.) 518, 7 A. D. 399; Brown v. Kimball, 25 Wend. (N. Y.) 259.

When evidence in rebuttal is adduced, the presumption disappears. See Jester v. Steiner, 86 Tex. 415.

<sup>387</sup> Jones v. Jones, 9 Mees. & W. 75; Sewell v. Evans, 4 Q. B. 626, 632; Wilson v. Holt, 83 Ala. 528, 3 A. S. R. 768, 775. See, however, Flournoy v. Warden, 17 Mo. 435.

<sup>388</sup> Mode v. Beasley, 143 Ind. 306, 332.

<sup>389</sup> Sitler v. Gehr, 105 Pa. 577, 51 A. R. 207; Sailor v. Hertzogg, 2 Pa. 182.

<sup>390</sup> Loudon v. Walpole, 1 Ind. 319; Bennett v. Libhart, 27 Mich. 489; Ambs v. C., St. P., M. & O. R. Co., 44 Minn. 266; Fanning v. Lent, 3 E. D. Smith (N. Y.) 206. *Contra*, Hunt v. Stewart, 7 Ala. 525; Bogue v. Bigelow, 29 Vt. 179.

A slight difference in the spelling of the name does not defeat the presumption. Gross v. Grossdale, 177 Ill. 248; Mallory v. Riggs, 76 Iowa, 748; Rust v. Eckler, 41 N. Y. 488, 492, 496; Bogue v. Bigelow,



If father and son bear the same name, the inference is that that name, standing alone, refers to the father,<sup>391</sup> in the absence of evidence to the contrary.<sup>392</sup>

The presumption may be allowed in criminal as well as civil cases.<sup>393</sup>

#### J. INNOCENCE, INTENT, AND MALICE.

#### § 49. Criminal cases.

(a) **Innocence.** If a person is charged with crime, it is presumed in the trial that he is innocent; and this presumption operates to throw on the state the burden of proof, in the sense that if, upon a consideration of the entire body of evidence adduced in the trial, the jury are not convinced of the accused's guilt, they must acquit him.<sup>394</sup> The presumption does not cease to operate upon submission of the case to the jury, but continues to work in favor of the accused throughout their deliberations.<sup>395</sup> Yet it is not in itself a matter of evidence. It is not a thing to be weighed or compared by the jury with the

29 Vt. 179. Nor does the absence of a middle initial. *Gross v. Grossdale*, 177 Ill. 248.

A finding that "R. P. O'Neill" and "Rev. Patrick O'Neill" refer to the same person is not justified, in the absence of evidence of identity. *Burford v. McCue*, 53 Pa. 427.

<sup>391</sup> *Sweeting v. Fowler*, 1 Starkie, 106; *Graves v. Colwell*, 90 Ill. 612. See *Lepiot v. Browne*, 1 Salk. 7; *State v. Vittum*, 9 N. H. 519.

A deed from E. G. to E. G., Jr., is presumed to be from father to son. *Cross v. Martin*, 46 Vt. 14.

<sup>392</sup> *Stebbing v. Spicer*, 8 Man., G. & S. 827, 8 C. B. 827.

<sup>393</sup> *Reg. v. Levy*, 8 Cox Cr. Cas. 73; *People v. Rolfe*, 61 Cal. 540; *State v. McGuire*, 87 Mo. 642; *State v. Kelsoe*, 76 Mo. 505; *State v. Moore*, 61 Mo. 276. See *State v. Vittum*, 9 N. H. 519.

<sup>394</sup> *U. S. v. Gooding*, 12 Wheat. (U. S.) 460; *Hawes v. State*, 88 Ala. 37; *Brooke v. People*, 23 Colo. 375; *People v. De Fore*, 64 Mich. 693, 8 A. S. R. 863; *State v. Wilbourne*, 87 N. C. 529; *Johnson v. State*, 30 Tex. App. 419, 28 A. S. R. 930; 8 Current Law, 206.

<sup>395</sup> *People v. O'Brien*, 106 Cal. 104; *Reeves v. State*, 29 Fla. 527.

evidence adduced by the state. Its sole effect is to fix on the state the burden of proof.<sup>396</sup>

Since the effect of the presumption is simply to fix the burden of proof, and since the burden of proof operates solely in the trial, it follows that the presumption has no operation elsewhere. It does not apply, for instance, in applications for bail in capital cases. The indictment for a capital offense is held to furnish a presumption of guilt, which the prisoner must overcome before he is entitled to release on bail,<sup>397</sup> and in some states this presumption of guilt may not be rebutted,<sup>398</sup> except under extraordinary circumstances.<sup>399</sup>

In stating this presumption it is usually said that it requires the state to prove guilt beyond a reasonable doubt. This, however, is a supplementary proposition as to the amount or weight of evidence which is required to overcome the presumption,<sup>400</sup> and it is accordingly elsewhere considered.<sup>401</sup>

As in civil cases, the burden of proof, in the sense of bur-

<sup>396</sup> Thayer, *Prel. Treat. Ev.* 337, 551. See § 17 (b), *supra*.

<sup>397</sup> *Ex parte White*, 9 Ark. 222; *Ex parte Kencall*, 100 Ind. 599; *Ex parte Goans*, 99 Mo. 193, 17 A. S. R. 571. And see *Ex parte Ryan*, 44 Cal. 555; *Ex parte Duncan*, 53 Cal. 410. *Contra*, *Ex parte Newman*, 38 Tex. Cr. App. 165, 70 A. S. R. 740.

The same rule applies on application for a writ of habeas corpus by one held under a commitment. *State v. Jones*, 113 N. C. 669, 22 L. R. A. 678.

<sup>398</sup> *U. S. v. Jones*, 3 Wash. C. C. 224, Fed. Cas. No. 15,495; *Hight v. U. S.*, *Morris* (Iowa) 407, 43 A. D. 111; *Ter. v. Benoit*, 1 Mart. (La.) 142; *State v. Brewster*, 35 La. Ann. 605; *People v. McLeod*, 1 Hill (N. Y.) 377, 25 Wend. 483, 37 A. D. 328. *Contra*, *Ex parte Acree*, 63 Ala. 234; *Ex parte Wolff*, 57 Cal. 94; *Lynch v. People*, 38 Ill. 494; *Lumm v. State*, 3 Ind. 293; *Ex parte Hock*, 68 Ind. 206; *Street v. State*, 43 Miss. 1; *State v. Hill*, 3 Brev. (S. C.) 89.

<sup>399</sup> *People v. Tinder*, 19 Cal. 539, 81 A. D. 77.

<sup>400</sup> Thayer, *Prel. Treat. Ev.* 558.

<sup>401</sup> Section 6 (a), *supra*.

den of convincing the jury of guilt, never shifts in the trial.<sup>402</sup> If, however, the state adduces evidence which makes a prima facie case of guilt, then the necessity of adducing evidence in denial or in rebuttal devolves on the accused. If he fails thus to go forward with the evidence, he is not entitled to an acquittal.<sup>403</sup> If, on the other hand, he discharges the burden of adduction, and adduces evidence which makes a prima facie defense, then that burden shifts back to the state, and it must adduce evidence in denial or avoidance of the accused's prima facie case.<sup>404</sup>

**(b) Intent and malice.** A prima facie case of guilt which, in the absence of evidence in denial or in rebuttal, requires a conviction, may consist in part of a presumption.<sup>405</sup> Two familiar instances are the presumptions of criminal intent and of malice.

Every man of legal capacity is presumed to contemplate the natural and probable consequences of acts done by him voluntarily and without mistake as to the facts. Consequently, if the commission of an act otherwise criminal is proved, this presumption operates to relieve the prosecution of the necessity resting on it in the first instance of adducing evi-

<sup>402</sup> *State v. Crawford*, 11 Kan. 32, 45; *People v. McWhorter*, 93 Mich. 641; *State v. Wingo*, 66 Mo. 181, 27 A. R. 329; *Com. v. Gerade*, 145 Pa. 289, 27 A. S. R. 689; *Phillips v. State*, 26 Tex. App. 228, 8 A. S. R. 471; *Horn v. State*, 30 Tex. App. 541. Shifting of burden of proof in civil cases, see §§ 2, 4(b), *supra*.

This is true in most states, even where the accused pleads justification or excuse. Section 49(c), *infra*. It is likewise true even where the circumstances proved by the state are such as to give rise to a presumption of criminal intent or malice. Page 201, *infra*.

<sup>403</sup> Prima facie case consisting of presumption, see § 49(b), *infra*.

<sup>404</sup> *Brown v. State*, 83 Ala. 33, 3 A. S. R. 685; *Gibson v. State*, 89 Ala. 121, 18 A. S. R. 96; *Angelo v. People*, 96 Ill. 209, 36 A. R. 132.

<sup>405</sup> *State v. Lee*, 69 Conn. 186; *State v. Ingram*, 16 Kan. 14; *State v. Wingo*, 66 Mo. 181, 27 A. R. 329; *Com. v. Gerade*, 145 Pa. 289, 27 A. S. R. 689. This is true of the presumption of sanity. Section 86, *infra*.

dence of an actual criminal intent on the part of the accused.<sup>406</sup> Thus, an intent to murder is presumed from the deliberate use of a deadly weapon.<sup>407</sup>

In like manner, malice is sometimes presumed from the commission of an act otherwise criminal in character, and the state is thereby relieved of the necessity resting on it in the first instance of adducing evidence of actual malice.<sup>408</sup> Thus, evidence of an intentional homicide, unaccompanied by circumstances of justification or excuse, gives rise to a presumption that the killing was done in malice.<sup>409</sup>

<sup>406</sup> Clark & M. Crimes (2d Ed.) § 58; *Rex v. Farrington*, Russ. & R. 07; *Rex v. Dixon*, 3 Maule & S. 11; *Allen v. U. S.*, 164 U. S. 492; *Agnew v. U. S.*, 165 U. S. 36; *Howard v. State*, 34 Ark. 433; *People v. Ah Gee Yung*, 86 Cal. 144; *People v. Brown*, 59 Cal. 345, 352; *Spies v. People*, 122 Ill. 1, 3 A. S. R. 320, 440; *Com. v. York*, 9 Metc. (Mass.) 93, 43 A. D. 373; *State v. Mason*, 26 Or. 273, 46 A. S. R. 629; *State v. Levelle*, 34 S. C. 120, 27 A. S. R. 799; *High v. State*, 26 Tex. App. 545, 8 A. S. R. 488 (statute); *Hill v. Com.*, 2 Grat. (Va.) 594. *Contra*, *Lane v. State*, 85 Ala. 11; *People v. Flack*, 125 N. Y. 324, 11 L. R. A. 807.

In some crimes, a specific intent is an essential ingredient, and here it will not be conclusively presumed. Clark & M. Crimes (2d Ed.) § 63.

<sup>407</sup> Clark & M. Crimes (2d Ed.) § 58; *Oliver v. State*, 17 Ala. 587, 601; *People v. Hunt*, 59 Cal. 430; *People v. Bushton*, 80 Cal. 160; *State v. Gillick*, 7 Iowa, 287; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 A. D. 711; *People v. Wolf*, 95 Mich. 625; *Com. v. Drum*, 58 Pa. 9; *State v. Smith*, 2 Strob. (S. C.) 77, 47 A. D. 589.

An assault made with a deadly weapon does not raise a presumption of an intent to kill, where death did not result. Clark & M. Crimes (2d Ed.) § 63; *People v. Mize*, 80 Cal. 41; *Patterson v. State*, 85 Ga. 131, 21 A. S. R. 152; *Gilbert v. State*, 90 Ga. 691; *Maher v. People*, 10 Mich. 212, 81 A. D. 781; *Roberts v. People*, 19 Mich. 401; *State v. Hickam*, 95 Mo. 322, 6 A. S. R. 54. *Contra*, *Smith v. State*, 88 Ala. 23; *Lane v. State*, 85 Ala. 11; *Wood v. State*, 27 Tex. App. 393 (statute). And see *Hall v. State*, 9 Fla. 203, 76 A. D. 617.

<sup>408</sup> Clark & M. Crimes (2d Ed.) § 62; *Hogan v. State*, 61 Ga. 43; *State v. Hessenkamp*, 17 Iowa, 25; *Conner v. State*, 4 Yerg. (Tenn.) 137, 26 A. D. 217.

<sup>409</sup> ENGLAND: *Morly's Case*, J. Kelyng, 53, Thayer, Cas. Ev. 44.

ALABAMA: *Gibson v. State*, 89 Ala. 121, 18 A. S. R. 96.

The intent is sometimes referred by law to a different act from the one which the accused had in mind,<sup>410</sup> as where he kills or injures one man in the attempt to kill or injure another. Here the intent is presumed to have existed with reference to the thing actually done.<sup>411</sup> And the same is true of

CALIFORNIA: *People v. March*, 6 Cal. 543.

GEORGIA: *Marshall v. State*, 74 Ga. 26; *Collier v. State*, 39 Ga. 31, 99 A. D. 449; *Clarke v. State*, 35 Ga. 75.

ILLINOIS: *Murphy v. People*, 37 Ill. 447; *Spies v. People*, 122 Ill. 1, 3 A. S. R. 320, 398.

MAINE: *State v. Knight*, 43 Me. 11.

MASSACHUSETTS: *Com. v. Drew*, 4 Mass. 391, 395; *Com. v. York*, 9 Metc. 93, 43 A. D. 373; *Com. v. Webster*, 5 Cush. 295, 52 A. D. 711.

MINNESOTA: *State v. Brown*, 41 Minn. 319.

MISSISSIPPI: *McDaniel v. State*, 8 Smedes & M. 401, 47 A. D. 93; *Green v. State*, 28 Miss. 687.

NEBRASKA: *Schlencker v. State*, 9 Neb. 241.

NORTH CAROLINA: *State v. Hildreth*, 31 N. C. (9 Ired.) 429, 51 A. D. 364.

PENNSYLVANIA: *Pa. v. Bell*, Add. 156, 1 A. D. 298.

TENNESSEE: *Coffee v. State*, 3 Yerg. 283, 24 A. D. 570; *Mitchell v. State*, 5 Yerg. 340, 350; *Epperson v. State*, 5 Lea, 291.

TEXAS: *Brown v. State*, 4 Tex. App. 275; *Martinez v. State*, 30 Tex. App. 129, 28 A. S. R. 895.

VIRGINIA: *McWhirt's Case*, 3 Grat. 594, 46 A. D. 196.

*Contra*, U. S. v. *Armstrong*, 2 Curt. 446, Fed. Cas. No. 14,467; *Farris v. Com.*, 14 Bush (Ky.) 362; *State v. Trivas*, 32 La. Ann. 1086, 36 A. R. 293; *Goodall v. State*, 1 Or. 333, 80 A. D. 396 (statute).

Malice may be inferred from the use of a deadly weapon, causing death. *Brown v. State*, 83 Ala. 33, 3 A. S. R. 685; *State v. Gillick*, 7 Iowa, 287; *State v. Deschamps*, 42 La. Ann. 567, 21 A. S. R. 392; *State v. Mitchell*, 64 Mo. 191; *Thomas v. People*, 67 N. Y. 218; *State v. Whitson*, 111 N. C. 695; *State v. Potts*, 100 N. C. 457; *State v. Bertrand*, 8 Or. 61; *Com. v. Drum*, 58 Pa. 9; *State v. Levelle*, 34 S. C. 120, 27 A. S. R. 799; *State v. McDonnell*, 32 Vt. 491.

<sup>410</sup> For illustrations, see *Clark & M. Crimes* (2d Ed.) § 59. For exceptions to the rule, see *Id.* § 59(e).

<sup>411</sup> *Reg. v. Smith*, 33 Eng. Law & Eq. 567, 1 Dears. Cr. Cas. 559; *Golliher v. Com.*, 2 Duv. (Ky.) 163, 87 A. D. 493; *State v. Benton*, 19 N. C. (2 Dev. & B.) 196; *Angell v. State*, 36 Tex. 542, 14 A. R. 380. *Contra*, *Bratton v. State*, 10 Humph. (Tenn.) 103 (statute).

malice. If, in the attempt to commit one offense, he commits another, malice is presumed with reference to the latter.<sup>412</sup>

The presumptions of criminal intent and malice are conclusive in the sense that, in the absence of justification or excuse, the nonexistence either of an actual criminal intent or actual malice is immaterial, and cannot be shown;<sup>413</sup> but they are disputable so far as to allow the accused to overcome them by adducing evidence of facts which in law excuse or justify the act for which he is on trial.<sup>414</sup> And when evidence in rebuttal is thus adduced, the question of malice or intent becomes one for the jury upon all the evidence, regardless of any presumption.<sup>415</sup>

By proving the facts on which either of these presumptions is founded, the state therefore makes a *prima facie* case of criminal intent or malice, as the case may be, and this presumption, coupled with evidence of the other elements of the crime in question, makes a *prima facie* case of guilt. And while the burden of proof, in the proper sense of the term, does not shift to the accused in this event,<sup>416</sup> yet there shifts

<sup>412</sup> *State v. Moore*, 25 Iowa, 128, 95 A. D. 776; *State v. Smith*, 2 Strob. (S. C.) 77, 47 A. D. 589.

<sup>413</sup> *Reg. v. Hill*, 2 Moody, Cr. Cas. 30; *State v. Patterson*, 116 Mo. 505. And see *Rex v. Sheppard*, Russ. & R. 169.

<sup>414</sup> *Brown v. State*, 83 Ala. 33, 3 A. S. R. 685; *Murphy v. People*, 37 Ill. 447; *State v. Knight*, 43 Me. 11; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 A. D. 711; *State v. Hildreth*, 31 N. C. (9 Ired.) 429, 51 A. D. 364; *Silvus v. State*, 22 Ohio St. 90, 100; *State v. Bertrand*, 3 Or. 61; *Pa. v. Bell*, Add. (Pa.) 156, 1 A. D. 298; *State v. Levelle*, 34 S. C. 120, 27 A. S. R. 799; *McWhirt's Case*, 3 Grat. (Va.) 594, 46 A. D. 196.

Burden of proof generally as to justification, see § 49(c), *infra*.

<sup>415</sup> See cases cited in note 418, *infra*.

<sup>416</sup> *People v. Boling*, 83 Cal. 380; *Maher v. People*, 10 Mich. 212, 81 A. D. 781; *People v. Garbutt*, 17 Mich. 9, 97 A. D. 162, 168; *Hawthorne v. State*, 58 Miss. 778; *State v. Hickam*, 95 Mo. 322, 6 A. S. R. 54; *Ter. v. Lucero*, 8 N. M. 543; *Tiffany v. Com.*, 121 Pa. 165, 6 A. S. R. 775; *Trumble v. Ter.*, 3 Wyo. 280, 6 L. R. A. 384. *Contra*, *State v. Whitson*, 111 N. C. 695; *State v. Bertrand*, 3 Or. 61.

upon him the burden of adducing evidence to overcome the *prima facie* case thus made against him,<sup>417</sup> unless evidence inconsistent with the presumption has been adduced by the state in proving the circumstances of the alleged crime, in which event no presumption arises, and the accused is entitled to go to the jury on his defense without adducing further evidence.<sup>418</sup>

(c) **Justification and excuse.** In civil cases, it has been seen, the burden of proving a defense by way of confession and avoidance rests on the defendant, in the sense that if the jury, upon a consideration of the entire body of evidence adduced in the trial, are not convinced of the truth of the defense, they must find for the plaintiff.<sup>419</sup> In some states the same rule is applied in criminal cases, so that, if the accused admits the doing of an act *prima facie* criminal in character, and alleges an excuse or justification, the burden of establishing this defense in the minds of the jury rests upon him, and he is not entitled to an acquittal merely because the evidence creates a reasonable doubt of his guilt.<sup>420</sup> An alibi is not an

<sup>417</sup> *Gibson v. State*, 89 Ala. 121, 18 A. S. R. 96; *People v. Garbutt*, 17 Mich. 9, 97 A. D. 162, 169; *State v. Wingo*, 66 Mo. 181, 27 A. R. 329.

<sup>418</sup> *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 A. D. 711; *Com. v. Hawkins*, 3 Gray (Mass.) 463; *Lamar v. State*, 63 Miss. 265; *Hawthorne v. State*, 58 Miss. 778; *State v. Dierberger*, 96 Mo. 666, 9 A. S. R. 380; *Ter. v. Lucero*, 8 N. M. 543; *Trumble v. Ter.*, 3 Wyo. 280, 6 L. R. A. 384.

<sup>419</sup> Section 8, *supra*.

<sup>420</sup> *Lewis v. State*, 88 Ala. 11 (semble); *People v. Schryver*, 42 N. Y. 1, 1 A. R. 480; *State v. Byrd*, 121 N. C. 684; *State v. Whitson*, 111 N. C. 695; *State v. Barringer*, 114 N. C. 840; *State v. Bertrand*, 3 Or. 61; *State v. Jones*, 20 W. Va. 764. See, also, *Boulden v. State*, 102 Ala. 78; *Roden v. State*, 97 Ala. 54; *Stitt v. State*, 91 Ala. 10, 24 A. S. R. 853; *Mitchell v. State*, 22 Ga. 211, 68 A. D. 493; *Appleton v. People*, 171 Ill. 473 (statute); *People v. McCarthy*, 110 N. Y. 309.

This seems formerly to have been the rule in California (*People*

affirmative defense, within the meaning of this rule, since its tendency is not to confess and avoid, but simply to deny. Accordingly, the burden does not rest on the accused to establish an alibi, either beyond a reasonable doubt or by a preponderance of the evidence. On the contrary, the burden is on the state to show the accused's presence at the crime; and unless the jury, upon considering the entire body of evidence, are convinced of the accused's guilt beyond a reasonable doubt, they must acquit him.<sup>421</sup>

v. Milgate, 5 Cal. 127), but no longer. See cases cited in note 422, *infra*.

In *State v. Schweitzer*, 57 Conn. 532, 6 L. R. A. 125, it is said that, while the accused is entitled to an acquittal if the jury have a reasonable doubt of his guilt, yet he must prove an affirmative defense by a preponderance of the evidence. These positions seem to conflict.

<sup>421</sup> ALABAMA: *Prince v. State*, 100 Ala. 144, 46 A. S. R. 28; *Pickens v. State*, 115 Ala. 42.

ARIZONA: *Schultz v. Ter.*, 52 Pac. 352.

CALIFORNIA: *People v. Fong Ah Sing*, 64 Cal. 253.

COLORADO: *McNamara v. People*, 24 Colo. 61.

FLORIDA: *Murphy v. State*, 31 Fla. 166.

ILLINOIS: *Miller v. People*, 39 Ill. 457; *Ackerson v. People*, 124 Ill. 563; *Carlton v. People*, 150 Ill. 181, 41 A. S. R. 346, 352 (semble).

INDIANA: *Howard v. State*, 50 Ind. 190; *Kaufman v. State*, 49 Ind. 248; *French v. State*, 12 Ind. 670, 74 A. D. 229.

IOWA: *State v. Hardin*, 46 Iowa, 623, 26 A. R. 174 (semble).

LOUISIANA: *State v. Ardoin*, 49 La. Ann. 1145, 62 A. S. R. 678.

MASSACHUSETTS: *Com. v. Choate*, 105 Mass. 451.

MICHIGAN: *People v. Pearsall*, 50 Mich. 233 (semble).

MISSISSIPPI: *Pollard v. State*, 53 Miss. 410, 24 A. R. 703.

MISSOURI: *State v. Howell*, 100 Mo. 628; *State v. Harvey*, 131 Mo. 339.

NEBRASKA: *Peyton v. State*, 54 Neb. 188.

NEW YORK: *People v. Stone*, 117 N. Y. 480.

NORTH CAROLINA: *State v. Josey*, 64 N. C. 56.

OHIO: *Walters v. State*, 39 Ohio St. 215.

OKLAHOMA: *Wright v. Ter.*, 5 Okl. 78.

OREGON: *State v. Chee Gong*, 16 Or. 534.

PENNSYLVANIA: *Turner v. Com.*, 86 Pa. 54, 27 A. R. 683; *Watson v. Com.*, 95 Pa. 418.



By the weight of authority, however, the accused is more favored when he alleges justification or excuse. These defenses, while in the nature of pleas in confession and avoidance, do not relieve the state from the burden of proof, in the proper sense of the term, and cast it on the accused. He is not required to establish the defense by a preponderance of the evidence,—much less beyond a reasonable doubt. On the contrary, if the jury, upon a consideration of the entire body of evidence adduced in the trial, entertain a reasonable doubt of the accused's guilt, he is entitled to an acquittal.<sup>422</sup> This rule results from the strictness with which criminal proceedings are regarded by the common law, and doubtless, also, from the fact that in criminal cases an affirmative defense need not be specially pleaded in order to be proved.<sup>423</sup> Even

**SOUTH DAKOTA:** *State v. Thornton*, 10 S. D. 349, 41 L. R. A. 530.

**TENNESSEE:** *Chappel v. State*, 7 Cold. 92.

**TEXAS:** *Ayres v. State*, 21 Tex. App. 399; *Horn v. State*, 30 Tex. App. 541.

**VIRGINIA:** *Thompson v. Com.*, 88 Va. 45 (semble).

*Contra*, *State v. Sutton*, 70 Iowa, 268, 270 (semble); *State v. Reed*, 62 Iowa, 40, 41 (semble); *State v. Jackson*, 36 S. C. 487, 31 A. S. R. 390.

In some cases it is said that, while the burden of proving an alibi to the satisfaction of the jury rests on the accused, yet he is entitled to an acquittal if his evidence raises a reasonable doubt of his guilt. These positions seem to be in conflict. *Rudy v. Com.*, 128 Pa. 500; *State v. Ward*, 61 Vt. 153, 192.

<sup>422</sup> *People v. Bushton*, 80 Cal. 160; *People v. Ah Gee Yung*, 86 Cal. 144; *People v. Elliott*, 80 Cal. 296; *People v. Lanagan*, 81 Cal. 142; *State v. Donahoe*, 78 Iowa, 486; *State v. Shea*, 104 Iowa, 724; *Com. v. McKie*, 1 Gray (Mass.) 61, 61 A. D. 410; *People v. Coughlin*, 65 Mich. 704; *King v. State*, 74 Miss. 576; *State v. Wingo*, 66 Mo. 181, 27 A. R. 329; *Gravely v. State*, 38 Neb. 871; *State v. McCluer*, 5 Nev. 132; *People v. Riordan*, 117 N. Y. 71; *People v. Downs*, 123 N. Y. 558, *Thayer, Cas. Ev.* 87; *State v. Neal*, 120 N. C. 613, 58 A. S. R. 810. See *State v. Schweitzer*, 57 Conn. 532, 6 L. R. A. 125, criticised in note 420, *supra*.

<sup>423</sup> In civil cases, the issue is ordinarily fixed by the pleadings before

where this rule prevails, however, the burden of adducing evidence in support of the defense in the first instance rests, it seems, on the accused, and, if he does not go forward with the evidence in discharge of this burden, he is not entitled to an acquittal.<sup>424</sup>

The burden of adducing evidence in support of a defense of excuse or justification thus rests on the accused only where the state, in proving the criminal act in question, adduces no evidence which tends to support that defense. If such evidence appears in the state's case, the accused is entitled to go to the jury without adducing further evidence.<sup>425</sup>

#### § 50. Civil cases.

(a) **Innocence.** The presumption of innocence applies in civil cases wherein a crime is charged, as well as in criminal

trial. In criminal cases the issue is not finally fixed until the accused has either interposed an affirmative defense in the trial or passed by his opportunity of doing so. A defense consisting of facts in excuse or justification is none the less affirmative, however, because the law allows it to be proved without a special pleading. The absence of such a pleading does not change the issue; it operates merely to delay the fixing of the issue. The fact, therefore, that an affirmative defense need not be specially pleaded in criminal cases, should not in reason operate to leave the burden of negating it on the state, but, on the contrary, the accused ought to bear the burden of establishing it. See note 3, *supra*.

<sup>424</sup> See *Boulden v. State*, 102 Ala. 78; *Roden v. State*, 97 Ala. 54; *Stitt v. State*, 91 Ala. 10, 24 A. S. R. 853; *Gibson v. State*, 89 Ala. 121, 18 A. S. R. 96; *Brown v. State*, 83 Ala. 33, 3 A. S. R. 685; *Mitchell v. State*, 22 Ga. 211, 68 A. D. 493; *Appleton v. People*, 171 Ill. 473; *People v. McCarthy*, 110 N. Y. 309.

It is otherwise by statute in murder cases in Oregon. *Goodall v. State*, 1 Or. 333, 80 A. D. 396.

<sup>425</sup> *Gibson v. State*, 89 Ala. 121, 18 A. S. R. 96; *People v. Schryver*, 42 N. Y. 1, 1 A. R. 480; *State v. Patterson*, 45 Vt. 308, 12 A. R. 200. See, also, page 202, *supra*.

prosecutions.<sup>426</sup> Thus it throws on the defendant in an action for libel the burden of proving the truth of a publication charging the plaintiff with crime.<sup>427</sup>

(b) **Intent.** Every man of legal capacity is presumed to contemplate the natural and probable consequences of acts done by him voluntarily and without mistake as to the facts.<sup>428</sup> An

<sup>426</sup> *Williams v. East India Co.*, 3 East, 192; *Lillenthal's Tobacco v. U. S.*, 97 U. S. 237, 266.

It is presumed, in the absence of evidence to the contrary, that a person's character is good. *Broughton v. McGrew*, 39 Fed. 672, 5 L. R. A. 406; *Goggans v. Monroe*, 31 Ga. 331; *Gaul v. Fleming*, 10 Ind. 253, 255.

As to whether a party charging crime in a civil action must prove it beyond a reasonable doubt, or whether a preponderance of the evidence is sufficient, see page 25, *supra*.

The presumption of innocence is contained in the maxims, *Injuria non praesumitur*, and *Odiosa non praesumuntur*.

The presumption of innocence is closely allied with various other presumptions considered in this chapter. Presumption as to alteration of instrument, see § 30(f), *supra*. Presumption as to fraud, duress, and undue influence, see §§ 43-45, *supra*. Presumption of legality, see §§ 55-58, *infra*. Presumption of legitimacy, see §§ 59, 60, *infra*. Presumptions as to negligence, see §§ 65-69, *infra*.

<sup>427</sup> *Ellis v. Buzzell*, 60 Me. 209, 11 A. R. 204; *Conroy v. Pittsburgh Times*, 139 Pa. 334, 23 A. S. R. 188.

<sup>428</sup> *Keyser v. Rice*, 47 Md. 203, 28 A. R. 448; *Lucke v. Clothing C. & T. Assembly*, 77 Md. 396, 39 A. S. R. 421; *Allison v. Chandler*, 11 Mich. 542; *Nichols v. Nichols*, 61 Vt. 426; *Timm v. Bear*, 29 Wis. 254.

*Preferences—Intent to defraud.* *Clarion Bank v. Jones*, 21 Wall. (U. S.) 335, 337; *Denny v. Dana*, 2 Cush. (Mass.) 160, 48 A. D. 655; *Hazen v. Lyndonville Nat. Bank*, 70 Vt. 543, 67 A. S. R. 680. See, however, *Nicol v. Crittenden*, 55 Ga. 497; *Sackett v. Mansfield*, 26 Ill. 21, 27.

*Trademarks—Intent to deceive.* *Holmes v. Holmes, B. & A. M. Co.*, 37 Conn. 278, 9 A. R. 324, 330; *El Modello C. M. Co. v. Gato*, 25 Fla. 886, 23 A. S. R. 537; *Keller v. Goodrich Co.*, 117 Ind. 556, 10 A. S. R. 88; *Kenny v. Gillet*, 70 Md. 574.

The same rule applies to a legislative act. Whenever and to the extent that the legislature of a state transcends its constitutional powers, it is conclusively presumed that it intended so to transcend them, and

illustration is found in cases of fraud. In order to constitute fraud, a false representation must be made with the intention that it shall be acted upon by some one to his injury,—an intention to deceive must exist; and if a man knows, either directly or inferentially, that his representations are untrue, it is presumed that he entertained an intention to defraud the other party.<sup>429</sup>

(c) **Malice.** In some circumstances an act is presumed to have been done in malice. Thus, the intentional publication of unprivileged defamatory matter concerning another raises a presumption of malice, and accordingly, in an action for slander or libel, the plaintiff need not prove malice in fact.<sup>430</sup> If the communication is privileged, however, this pre-

extrinsic evidence of good motives or other considerations is not admissible to save the act. *State v. Cunningham*, 83 Wis. 90, 35 A. S. R. 27.

<sup>429</sup> *Hammon*, Cont. § 119; *Ormrod v. Huth*, 14 Mees. & W. 651; *Endsley v. Johns*, 120 Ill. 469, 60 A. R. 572; *Buschman v. Codd*, 52 Md. 202; *Nash v. M. T. I. & T. Co.*, 163 Mass. 574, 47 A. S. R. 489; *Humphrey v. Merriam*, 32 Minn. 197; *Clopton v. Cozart*, 13 Smedes & M. (Miss.) 363; *Eibel v. Von Fell*, 63 N. J. Law, 3; *McIntyre v. Buell*, 132 N. Y. 192; *Stafford v. Newsom*, 31 N. C. (9 Ired.) 507; *Butterfield v. Barber*, 20 R. I. 99; *Boyd's Ex'rs v. Browne*, 6 Pa. 310.

<sup>430</sup> ENGLAND: *Haile v. Wilson*, 9 Barn. & C. 643.

UNITED STATES: *Union M. L. Ins. Co. v. Thomas*, 83 Fed. 803; *Broughton v. McGrew*, 39 Fed. 672, 5 L. R. A. 406.

CALIFORNIA: *Childers v. San Jose M. P. & P. Co.*, 105 Cal. 284, 45 A. S. R. 40.

INDIANA: *Byrket v. Monohon*, 7 Blackf. 83, 41 A. D. 212; *Gaul v. Fleming*, 10 Ind. 253.

KENTUCKY: *Riley v. Lee*, 88 Ky. 603, 21 A. S. R. 358.

LOUISIANA: *Well v. Israel*, 42 La. Ann. 955.

MASSACHUSETTS: *Bodwell v. Osgood*, 3 Pick. 379, 15 A. D. 228.

MICHIGAN: *Bell v. Fernald*, 71 Mich. 267; *Davis v. Marxhausen*, 103 Mich. 315.

MISSOURI: *Mitchell v. Bradstreet Co.*, 116 Mo. 226, 38 A. S. R. 592; *St. James Military Academy v. Gaiser*, 125 Mo. 517, 46 A. S. R. 502.

NEW YORK: *Byam v. Collins*, 111 N. Y. 143, 7 A. S. R. 726; *King v. Root*, 4 Wend. 113, 21 A. D. 102.

sumption does not arise.<sup>431</sup> If the privilege is absolute, the defendant is justified, without regard to whether or not he acted maliciously. If the privilege is qualified, proof of actual malice is necessary to support a recovery.<sup>432</sup>

The presumption of malice arising from the intentional publication of defamatory matter is rebuttable in the sense that the defendant may show that the publication was privileged,<sup>433</sup> but, in the absence of such a showing, it is a conclusive pre-

OREGON: *Upton v. Hume*, 24 Or. 420, 41 A. S. R. 863.

PENNSYLVANIA: *Collins v. Dispatch Pub. Co.*, 152 Pa. 187, 34 A. S. R. 636; *Conroy v. Pittsburgh Times*, 139 Pa. 334, 23 A. S. R. 188.

TEXAS: *Bradstreet Co. v. Gill*, 72 Tex. 115, 13 A. S. R. 768; *Holt v. Parsons*, 23 Tex. 9, 76 A. D. 49.

VIRGINIA: *Dillard v. Collins*, 25 Grat. 343.

WISCONSIN: *Candrian v. Miller*, 98 Wis. 164.

The presumption arises also in a prosecution for criminal libel: *State v. Clyne*, 53 Kan. 8; *State v. Brady*, 44 Kan. 435, 21 A. S. R. 296; *Com. v. Blanding*, 3 Pick. (Mass.) 304, 15 A. D. 214; *Com. v. Snelling*, 15 Pick. (Mass.) 337; *State v. Mason*, 26 Or. 273, 46 A. S. R. 629.

Damages are presumed from the unauthorized publication of actionable words. *Byam v. Collins*, 111 N. Y. 143, 7 A. S. R. 726; *Belo v. Fuller*, 84 Tex. 450, 31 A. S. R. 75. And see *Collins v. Dispatch Pub. Co.*, 152 Pa. 187, 34 A. S. R. 636.

One who sells and delivers a paper containing a libel is presumed to know that it contains a libel, in the absence of evidence to the contrary. *Street v. Johnson*, 80 Wis. 455, 14 L. R. A. 203.

<sup>431</sup> *Coogler v. Rhodes*, 38 Fla. 240, 56 A. S. R. 170; *Stewart v. Hall*, 83 Ky. 375; *Gardemal v. McWilliams*, 43 La. Ann. 454, 26 A. S. R. 195; *Bearce v. Bass*, 88 Me. 521, 51 A. S. R. 446; *Ala. & V. R. Co. v. Brooks*, 69 Miss. 168, 30 A. S. R. 528; *Byam v. Collins*, 111 N. Y. 143, 7 A. S. R. 726; *King v. Root*, 4 Wend. (N. Y.) 113, 21 A. D. 102; *Press Co. v. Stewart*, 119 Pa. 584; *Conroy v. Pittsburgh Times*, 139 Pa. 334, 23 A. S. R. 188; *Kent v. Bongartz*, 15 R. I. 72, 2 A. S. R. 370; *Mo. Pac. R. Co. v. Richmond*, 73 Tex. 568, 15 A. S. R. 794; *Dillard v. Collins*, 25 Grat. (Va.) 343; *Brown v. N. & W. R. Co.*, 100 Va. 619, 60 L. R. A. 472; *Wilson v. Noonan*, 35 Wis. 321, 349.

<sup>432</sup> *Byrd v. Hudson*, 113 N. C. 203; *Ramsey v. Cheek*, 109 N. C. 270.

<sup>433</sup> *Holt v. Parsons*, 23 Tex. 9, 76 A. D. 49; *Strode v. Clement*, 90 Va. 553.

sumption; that is to say, it is a rule of substantive law to the effect that one who intentionally publishes unprivileged defamatory matter concerning another is responsible in law, even though he acted in good faith. Want of actual malice is immaterial.<sup>434</sup>

#### K. KNOWLEDGE OF CONTENTS OF INSTRUMENT.

##### § 51. Contracts and conveyances.

It is said that a man is presumed to know the contents of an instrument which he executes. Correctly speaking, this is not a presumption. It is rather a rule that, in the absence of a certain form of fraud or mistake, the executant of an instrument shall not be permitted to allege ignorance of its contents, either as a cause of action or as a ground of defense.<sup>435</sup> If the executant, at the time he signs the instrument, labors under a mistake as to the nature of the transaction evidenced by the writing, the rule just announced does not apply, however, and the instrument may be avoided. Mistake in this regard may be induced either by the misrepresentation of a third person as to the contents of the instrument, or by

<sup>434</sup> *Burt v. Advertiser N. Co.*, 154 Mass. 238; *Byrd v. Hudson*, 113 N. C. 203; *Ramsey v. Cheek*, 109 N. C. 270; *Wilson v. Noonan*, 35 Wis. 321, 349.

<sup>435</sup> *Warren v. Jacksonville*, 15 Ill. 236, 58 A. D. 610; *Androscoggin Bank v. Kimball*, 10 Cush. (Mass.) 373; *Fivey v. Pa. R. Co.*, 67 N. J. Law, 627, 91 A. S. R. 445.

A man executes an instrument, within the meaning of this rule, whether he signs it in writing or by making his mark. *Bates v. Harte*, 124 Ala. 427, 82 A. S. R. 186; *Doran v. Mullen*, 78 Ill. 342; *Harris v. Story*, 2 E. D. Smith (N. Y.) 363.

The rule applies only to the parties to the instrument. An attesting witness is not presumed to know the contents of the writing that he witnesses. *Plummer v. Baskerville*, 36 N. C. (1 Ired. Eq.) 252.

If a corporation formally ratifies a contract made by its agent without authority, the presumption is that it knew all the terms of the contract. *Blen v. Bear R. & A. W. & M. Co.*, 20 Cal. 602, 81 A. D. 132.

the misrepresentation of the other party to the transaction. In either event, the effect of the mistake is the same,—the instrument is void. The only difference in the two cases is that in the latter there is, and in the former there is not, fraud as between the parties to the instrument.

It is to be observed that there is a wide distinction between mistake as to the nature of the transaction and mistake as to the precise effect which the contemplated act will have. If a man entering into a contract knows the general purport of the transaction, the fact that he is mistaken as to its legal effect does not ordinarily afford him ground for relief.<sup>435a</sup> Thus, if an illiterate person signs a deed of conveyance upon the representation of a disinterested third person that the instrument is a power of attorney, the mistake is fundamental, and goes to the nature of the transaction, and the deed is void. On the other hand, if a man executes a deed as security, knowing it to be a conveyance, he will not be relieved because he believed it to be a mere form, which would not be enforced against him.<sup>435b</sup>

Mistake as to the nature of the transaction is confined almost necessarily to cases of written contract, and it usually arises where the mistaken party is unable for some reason to read the instrument supposed to embody the terms of the contract proposed. Thus, if a person who contemplates executing a written contract is blind, or illiterate, or unfamiliar with the tongue employed by the draftsman, and some one misreads the instrument to him, or misrepresents its contents to such a degree that the writing is of a nature altogether different from the contract proposed orally, and he is thereby induced to sign the writing, he is not bound.<sup>435c</sup> The contract

<sup>435a</sup> See § 53(c), *infra*.

<sup>435b</sup> See *Hunter v. Walters*, 7 Ch. App. 75.

<sup>435c</sup> *Thoroughgood's Case*, 2 Coke, 9a; *Foster v. Mackinnon*, L. R. 4

fails, in cases of this kind, from an absence of the contractual element of agreement.<sup>436</sup> If, however, a person about to sign a contract is guilty of negligence in failing to ascertain the contents of the paper, he is bound by his signature, even though he labors under a mistake as to the nature of the transaction there expressed. It may therefore be laid down as a rule that, if a person able to read a document signs it without reading it, he is ordinarily to be regarded as negligent, and he cannot avoid the contract because he thought the document embodied a transaction of a different nature.<sup>437</sup>

C. P. 704; *Bates v. Harte*, 124 Ala. 427, 82 A. S. R. 186; *Puffer v. Smith*, 57 Ill. 527; *Baldwin v. Bricker*, 86 Ind. 221; *Esterly v. Eppelshelmer*, 73 Iowa, 260; *Kagel v. Totten*, 59 Md. 447; *Trambly v. Ricard*, 130 Mass. 259; *Soper v. Peck*, 51 Mich. 563; *Wright v. McPike*, 70 Mo. 175; *First Nat. Bank v. Lierman*, 5 Neb. 247; *Jackson v. Hayner*, 12 Johns. (N. Y.) 469; *Schuykill Co. v. Copley*, 67 Pa. 386, 5 A. R. 441; *Perez v. Everett*, 73 Tex. 431; *Walker v. Egbert*, 29 Wis. 194, 9 A. R. 548; *Bowers v. Thomas*, 62 Wis. 480. And see *Hewitt v. Jones*, 72 Ill. 218; *Gibbs v. Linabury*, 22 Mich. 479, 7 A. R. 675; *De Camp v. Hamma*, 29 Ohio St. 467.

<sup>436</sup> *Foster v. Mackinnon*, L. R. 4 C. P. 704, 711.

<sup>437</sup> *Upton v. Tribilcock*, 91 U. S. 45; *Hazard v. Griswold*, 21 Fed. 178; *Kimmell v. Skelly*, 130 Cal. 555; *Wheeler & W. Mfg. Co. v. Long*, 8 Ill. App. 463; *Robinson v. Glass*, 94 Ind. 211; *McCormack v. Molburg*, 43 Iowa, 561; *Pa. R. Co. v. Shay*, 82 Pa. 198, 203; *Bishop v. Allen*, 55 Vt. 423; *Sanger v. Dun*, 47 Wis. 615, 32 A. R. 789.

If a man may learn the terms of a contract by inquiry, and he guarantees the contract without ascertaining its terms, nobody misleading him, he is bound, even though he was mistaken as to the terms of the contract. *Bascom v. Smith*, 164 Mass. 61.

There are some circumstances, however, which will excuse the reading of a contract by a person able to read it, so that he will not be bound by his signature. *Foster v. Mackinnon*, L. R. 4 C. P. 704, 711; *Beck & P. L. Co. v. Houppert*, 104 Ala. 503, 53 A. S. R. 77; *Dashiel v. Harshman*, 113 Iowa, 283; *Allen v. Konrad*, 59 App. Div. (N. Y.) 21; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40. Thus, the existence of a confidential relation between the parties to the instrument, such as the relation of husband and wife, may excuse the failure to read the paper before signing it. *De Ruiter v. De Ruiter*, 28 Ind. App. 9, 91 A. S. R. 107.



This applies with especial force to the execution of negotiable instruments which afterwards, and before maturity, pass for a valuable consideration into the hands of innocent third persons.<sup>438</sup>

The rule requiring an exercise of diligence by a contracting party applies as well to persons unable to read as to others; and if a person cannot, for one reason or another, read the writing he contemplates signing, he must require it to be read to him, either literally or in substance, before he signs it, else he will be bound, his mistake as to the nature of the contract notwithstanding.<sup>439</sup>

These principles find illustration in the law of insurance and carriers. The insured is presumed to know the contents of the application signed by him,<sup>440</sup> and also of the policy issued to him.<sup>441</sup> So, if a bill of lading or freight receipt con-

<sup>438</sup>1 Daniel, Neg. Inst. §§ 845-853; Cannon v. Lindsey, 85 Ala. 198, 7 A. S. R. 38; Walton Guano Co. v. Copelan, 112 Ga. 319, 52 L. R. A. 268; Leach v. Nichols, 55 Ill. 273; Baldwin v. Barrows, 86 Ind. 351; Douglass v. Matting, 29 Iowa, 498; Ort v. Fowler, 31 Kan. 478, 47 A. R. 501; Kellogg v. Curtis, 65 Me. 59; Mackey v. Peterson, 29 Minn. 298; Shirts v. Overjohn, 60 Mo. 305; Citizens' Nat. Bank v. Smith, 55 N. H. 593; Chapman v. Rose, 56 N. Y. 137, 15 A. R. 401; Ross v. Doland, 29 Ohio St. 473. See First Nat. Bank v. Johns, 22 W. Va. 520, 46 A. R. 506.

<sup>439</sup>Foster v. Mackinnon, L. R. 4 C. P. 704, 711; Thoroughgood's Case, 2 Coke, 9a; Bates v. Harte, 124 Ala. 427, 82 A. S. R. 186; Bedell v. Herring, 77 Cal. 572; Hawkins v. Hawkins, 50 Cal. 558; Robinson v. Glass, 94 Ind. 211; Baldwin v. Bricker, 86 Ind. 221, 222; Roach v. Karr, 18 Kan. 529, 26 A. R. 788; Foye v. Patch, 132 Mass. 105; Trambly v. Ricard, 130 Mass. 259; School Committee v. Kesler, 67 N. C. 443; Bowers v. Thomas, 62 Wis. 480.

If an instrument is read to an illiterate person, he is presumed to understand its contents. Green v. Maloney, 7 Houst. (Del.) 22.

<sup>440</sup>Ryan v. World M. L. Ins. Co., 41 Conn. 168, 19 A. R. 490; Hartford L. & A. Ins. Co. v. Gray, 80 Ill. 28, 91 Ill. 159; Southern Mut. Ins. Co. v. Yates, 28 Grat. (Va.) 585.

<sup>441</sup>Cleaver v. Traders' Ins. Co., 71 Mich. 414, 15 A. S. R. 275; Morri-son v. Ins. Co. of N. A., 69 Tex. 353, 5 A. S. R. 63; Straker v. Phenix

taining stipulations limiting the common-law liability of the carrier is delivered to the shipper and retained by him, the presumption is, in the absence of fraud or mistake, that he knew of those stipulations and assented to them.<sup>442</sup>

The presumption thus indulged against the shipper is not affected by the fact that he did not sign the bill of lading or receipt,<sup>443</sup> nor by the fact that he failed to read the instrument;<sup>444</sup> and this is so, even though he was for some reason

*Ins. Co.*, 101 Wis. 413. Under some circumstances, however, the insured has a right to suppose that a renewal policy is like the original. *Burson v. Fire Ass'n*, 136 Pa. 267, 20 A. S. R. 919.

<sup>442</sup> *Mulligan v. Ill. Cent. R. Co.*, 36 Iowa, 181, 14 A. R. 514; *Pac. Exp. Co. v. Foley*, 46 Kan. 467, 26 A. S. R. 107; *Cox v. Cent. Vt. R.*, 170 Mass. 129; *Smith v. American Exp. Co.*, 108 Mich. 572; *Christenson v. American Exp. Co.*, 15 Minn. 270, 2 A. R. 122; *Durgin v. American Exp. Co.*, 66 N. H. 277; *Zimmer v. N. Y. C. & H. R. R. Co.*, 137 N. Y. 460; *Germania F. Ins. Co. v. M. & C. R. Co.*, 72 N. Y. 90, 28 A. R. 113; *Ballou v. Earle*, 17 R. I. 441, 33 A. S. R. 881; *Merchants' Dispatch Transp. Co. v. Bloch*, 86 Tenn. 392, 6 A. S. R. 847; *Dillard v. L. & N. R. Co.*, 70 Tenn. 288; *Ryan v. Mo., K. & T. R. Co.*, 65 Tex. 13; *Davis v. Cent. Vt. R. Co.*, 66 Vt. 290, 44 A. S. R. 852; *Boorman v. American Exp. Co.*, 21 Wis. 152. *Contra*, *Central R. & B. Co. v. Hasselkus*, 91 Ga. 382, 44 A. S. R. 37 (statute); *Chicago & N. W. R. Co. v. Calumet Stock Farm*, 194 Ill. 9, 88 A. S. R. 68; *Pittsburgh, C. & St. L. R. Co. v. Barrett*, 36 Ohio St. 448 (semble).

The shipper is not presumed to assent to a provision in the bill of lading which is illegible. *Perry v. Thompson*, 98 Mass. 249. Nor is his assent presumed to conditions on the back of the bill of lading or receipt unless he is shown to have known of them. *Mich. Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 A. D. 760. And see *N. Y., N. H. & H. R. Co. v. Sayles*, 87 Fed. 444.

<sup>443</sup> *The Henry B. Hyde*, 82 Fed. 681; *Mouton v. L. & N. R. Co.*, 128 Ala. 537; *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 606, 94 A. S. R. 279.

<sup>444</sup> *Leitch v. Union R. Transp. Co.*, 7 Chl. Leg. News, 291, Fed. Cas. No. 8,224; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397, 7 A. S. R. 104; *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210; *Louisville & N. R. Co. v. Brownlee*, 14 Bush (Ky.) 590; *Grace v. Adams*, 100 Mass. 505, 97 A. D. 117, 1 A. R. 131; *McMillan v. Mich. S. & N. I. R.*, 16 Mich. 79, 93

unable to read it.<sup>445</sup> Knowledge of the contents of the document is not presumed against the shipper merely from the fact of his having received and kept it, however, where it was not delivered to him until after the goods were shipped, and it contains terms not mentioned in the agreement under which the property was accepted for shipment.<sup>446</sup>

The presumption of knowledge arises against a passenger, also, where he accepts a ticket which takes the form, not of a mere check to indicate the route, but of a contract covering the rights of the parties. He is accordingly bound by its terms, even though he failed to read it.<sup>447</sup>

### § 52. Wills.

Generally speaking, evidence of the due execution of a will by a person of capacity raises a presumption that the

A. D. 208; *McFadden v. Mo. Pac. R. Co.*, 92 Mo. 343, 1 A. S. R. 721; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 A. R. 475; *Hill v. S. B. & N. Y. R. Co.*, 73 N. Y. 351, 29 A. R. 163; *Phifer v. C. C. R. Co.*, 89 N. C. 311, 45 A. R. 687; *Johnstone v. Richmond, etc., R. Co.*, 39 S. C. 55; *Schaller v. C. & N. W. R. Co.*, 97 Wis. 31.

<sup>445</sup> *Jones v. C. & S. M. R. Co.*, 89 Ala. 376; *Fibel v. Livingston*, 64 Barb. (N. Y.) 179.

<sup>446</sup> *The Arctic Bird*, 109 Fed. 167; *Merchants' Despatch Transp. Co. v. Furthmann*, 149 Ill. 66, 41 A. S. R. 265; *Mo. Pac. R. Co. v. Beeson*, 30 Kan. 298; *Swift v. Pac. Mail S. S. Co.*, 106 N. Y. 206; *Bostwick v. B. & O. R. Co.*, 45 N. Y. 712; *Gaines v. Union T. & I. Co.*, 28 Ohio St. 418; *Ill. Cent. R. Co. v. Craig*, 102 Tenn. 298; *Mo., K. & T. R. Co. v. Carter*, 9 Tex. Civ. App. 677; *Strohn v. D. & M. R. Co.*, 21 Wis. 554, 94 A. D. 564.

In some states, however, the presumption of knowledge applies against the shipper if he signs the instrument thus subsequently delivered, even though it differs from the previous oral agreement. *Stewart v. Cleveland, C., C. & St. L. R. Co.*, 21 Ind. App. 218; *Hutchinson v. C., St. P., M. & O. R. Co.*, 37 Minn. 524; *St. Louis, K. C. & N. R. Co. v. Cleary*, 77 Mo. 634, 46 A. R. 13.

<sup>447</sup> *Boylan v. H. S. R. Co.*, 132 U. S. 146; *Fonseca v. Cunard S. S. Co.*, 153 Mass. 553, 25 A. S. R. 660. And see *Crary v. L. V. R. Co.*, 203 Pa. 525, 93 A. S. R. 778.

testator was aware of the contents of the instrument.<sup>448</sup> In some states this is true, even where the will contains a provision for the benefit of the draughtsman,<sup>449</sup> unless it was drawn by a stranger to the blood of the testator, and it contains a considerable provision for his benefit, in which case it is presumed that the testator was not aware of the contents of the document, and the burden of proving the contrary rests on the proponent.<sup>450</sup> The authorities on this question are not in accord.

<sup>448</sup> *Guardhouse v. Blackburn*, L. R. 1 Prob. & Div. 109, *Thayer, Cas. Ev.* 836, 840; *Garrett v. Heflin*, 98 Ala. 615, 39 A. S. R. 89; *Hughes v. Meredith*, 24 Ga. 325, 71 A. D. 127; *Robinson v. Brewster*, 140 Ill. 649, 33 A. S. R. 265; *Sechrest v. Edwards*, 4 Metc. (Ky.) 163; *Barnes v. Barnes*, 66 Me. 286, 296; *Downey v. Murphey*, 18 N. C. (1 Dev. & B.) 82; *Rees v. Stille*, 38 Pa. 138. See, however, *Gerrish v. Nason*, 22 Me. 438, 39 A. D. 589.

There is no distinction in this respect between wills executed by those who can and those who cannot write. *Doran v. Mullen*, 78 Ill. 342.

<sup>449</sup> *Cramer v. Crumbaugh*, 3 Md. 491; *Blume v. Hartman*, 115 Pa. 32, 2 A. S. R. 525. If, however, the capacity of the testator is in doubt, or if he can neither read, write, nor speak, evidence is essential that he knew the contents of the will. *Delafield v. Parish*, 25 N. Y. 9, 35; *Rollwagen v. Rollwagen*, 63 N. Y. 504; *Tomkins v. Tomkins*, 1 Bailey, (S. C.) 92, 19 A. D. 656; *Watterson v. Watterson*, 1 Head (Tenn.) 1.

Testator's knowledge of the contents of the document may be shown by circumstantial evidence. *Raworth v. Marriott*, 1 Mylne & K. 643; *Nexsen v. Nexsen*, 3 Abb. Dec. (N. Y.) 360; *Montague v. Allan's Ex'r*, 78 Va. 592, 49 A. R. 384.

Knowledge of the contents of a will is imputed to a corporation from its knowledge of the existence of the document, where title to its stock depends upon the terms of the will. *Marbury v. Ehlen*, 72 Md. 206, 20 A. S. R. 467; *Caulkins v. Gas-Light Co.*, 85 Tenn. 683, 4 A. S. R. 786.

<sup>450</sup> *Garrett v. Heflin*, 98 Ala. 615, 39 A. S. R. 89; *Hughes v. Meredith*, 24 Ga. 325, 71 A. D. 127; *Beall v. Mann*, 5 Ga. 456; *Blume v. Hartman*, 115 Pa. 32, 2 A. S. R. 525; *Kelly v. Settegast*, 68 Tex. 13; *In re Barney's Will*, 70 Vt. 352.

If a will drawn by the testator's confidential agent contains a pro-

## L. LAW.

## § 53. Knowledge of law.

Citizens of a state are said to be presumed to know the law of their domicile; consequently they are not allowed to allege ignorance of it as an excuse for their acts or omissions.<sup>451</sup> This

vision in his own favor, it is at most a suspicious circumstance of more or less weight, according to the facts of each particular case. *Barry v. Butlin*, 2 Moore P. C. 480, *Thayer*, Cas. Ev. 82; *Downey v. Murphey*, 18 N. C. (1 Dev. & B.) 82; *Yardley v. Cuthbertson*, 108 Pa. 395, 56 A. R. 218. See, however, *Tyrrell v. Painton* [1894] Prob. 151, 156, *Thayer*, Cas. Ev. 85. See, generally, 6 Current Law, 1909.

<sup>451</sup> *Morgan v. U. S.*, 113 U. S. 476; *Goodwyn v. Baldwin*, 59 Ala. 127; *Gauldin v. Shehee*, 20 Ga. 531; *Marshall County Sup'rs v. Cook*, 38 Ill. 44, 87 A. D. 282; *Shortwell v. Murray*, 1 Johns. Ch. (N. Y.) 512.

A limitation upon the rule that ignorance of the law is no ground for relief is made in cases where the error is in reference to foreign law. *Norton v. Marden*, 15 Me. 45; *Haven v. Foster*, 9 Pick. (Mass.) 112; *Vinal v. Continental C. & I. Co.*, 53 Hun (N. Y.) 247; *Bank of Chillicothe v. Dodge*, 8 Barb. (N. Y.) 233; *Curtis v. Leavitt*, 15 N. Y. 9, 193; *King v. Doolittle*, 1 Head (Tenn.) 77. The law of a sister state is foreign law in this sense. *Upton v. Englehart*, 3 Dill. 496, 501, Fed. Cas. No. 16,800; *Waterman v. Sprague Mfg. Co.*, 55 Conn. 554; *Bethell v. Bethell*, 92 Ind. 318; *Haven v. Foster*, 9 Pick. (Mass.) 112; *Finch v. Mansfield*, 97 Mass. 89; *Wood v. Roeder*, 50 Neb. 476; *Bank of Chillicothe v. Dodge*, 8 Barb. (N. Y.) 233; *King v. Doolittle*, 1 Head (Tenn.) 77. A nonresident is bound to take notice of the law of the place where he acts, however. The exception as to foreign law, just noted, does not excuse his ignorance of the law of a foreign state in which he is staying. *In re Barronet*, 1 El. & Bl. 1; *Rex v. Esop*, 7 Car. & P. 456; *Tyson v. Passmore*, 2 Pa. 122, 44 A. D. 181. And where one makes a contract with direct reference to the law of a foreign state, he is bound to take notice of that law. *Huthsing v. Bosquet*, 3 McCrary, 569, 17 Fed. 54.

A man is not presumed to know special or private legislative acts. *King v. Doolittle*, 1 Head (Tenn.) 77. Nor administrative orders. *State v. Butts*, 3 S. D. 577, 19 L. R. A. 725.

Misconstruction of a doubtful rule of law is sometimes regarded by the courts as relieving a party from a liability which would otherwise accrue from acts based on the mistake. *Marsh v. Whitmore*, 21 Wall. (U. S.) 178; *Miller v. Proctor*, 20 Ohio St. 442; *Morrill v. Graham*, 27 Tex. 646. And see *Kostenbader v. Spotts*, 80 Pa. 430.

so-called presumption is not truly such. It is a rule of substantive law having no relation to evidence, and is correctly expressed in the form, Ignorance of the law excuses no man from the legal consequences of his acts or omissions. This being so, if it becomes material to inquire whether a man knew the state of the law in some particular, the so-called presumption does not operate to supply evidence that he had such knowledge, nor does it affect the burden of proof as to that fact. It furnishes a rule of liability, not of evidence.<sup>453</sup>

(a) **Crimes.** This principle is applied in criminal cases. If a man does an act which constitutes a crime in law, he cannot ordinarily escape punishment because he did not know that the law attached that character to the act.<sup>453</sup> Thus, a person is guilty of bigamy or adultery, even though he believed that a void decree of divorce obtained by him or the other party was valid.<sup>454</sup> The rule does not apply, however, where, by reason of mistake as to one's legal rights, there was an absence of a specific criminal intent which is essential to the crime charged.<sup>455</sup>

Generally, money paid under mistake of law cannot be recovered by the payer, although it is against conscience for the payee to retain it. Keener, *Quasi Cont.* 85-96; *Clarke v. Dutcher*, 9 *Cow.* (N. Y.) 674.

<sup>453</sup> Thayer, *Prel. Treat. Ev.* 335; *Martindale v. Falkner*, 2 *C. B.* 706, 719; *Reg. v. Tewkesbury*, *L. R.* 3 *Q. B.* 629; *Black v. Ward*, 27 *Mich.* 191, 15 *A. R.* 162; *State v. Kimbrough* (Tenn.) 52 *L. R. A.* 668.

<sup>454</sup> *Clark & M. Crimes* (2d Ed.) §§ 73, 74; *Reg. v. Mailloux*, 3 *Pugs.* (N. B.) 493; *U. S. v. Anthony*, 11 *Blatchf.* 200, *Fed. Cas. No.* 14,459; *Winehart v. State*, 6 *Ind.* 30; *Com. v. Bagley*, 7 *Pick.* (Mass.) 279; *People v. Ackerman*, 80 *Mich.* 588; *Whitton v. State*, 37 *Miss.* 379. See, however, *Brent v. State*, 43 *Ala.* 297.

This rule is applied in civil cases wherein a crime is alleged. *Cluff v. Mut. B. L. Ins. Co.*, 13 *Allen* (Mass.) 308.

<sup>455</sup> *Russell v. State*, 66 *Ark.* 185; *State v. Hughes*, 58 *Iowa*, 165; *State v. Goodenow*, 65 *Me.* 30; *Reynolds v. State*, 58 *Neb.* 49.

<sup>456</sup> *Clark & M. Crimes* (2d Ed.) § 75; *Rex v. Hall*, 3 *Car. & P.* 409; *Reg. v.*

(b) **Torts.** Neither are the consequences attaching by law to civil wrongs affected ordinarily by the guilty party's ignorance of wrongdoing.<sup>456</sup> If, for instance, an officer arrests or imprisons a man under a writ which is void in law on its face, he is not excused from answering in damages by the fact that he thought the writ valid.<sup>457</sup>

(c) **Contracts.** Important applications of the principle that ignorance or mistake of law excuses no man from the legal effect of his acts or omissions occur in the law of contract. The principle may affect the formation of the contract, its ratification, or its legality.

— **Formation of contract.** While ignorance or mistake of fact often prevents the formation of a contract,<sup>458</sup> it is generally otherwise in regard to mistake of law, though it should be said that the cases are not in accord on this point. As a rule, a mistake as to the legal effect of a contract into which the parties enter, arising out of their ignorance or misapprehension of the law, does not defeat the contract, or excuse them from performing it according to its terms, and evidence to show such mistake or ignorance is accordingly inadmissible.<sup>459</sup> It is important to note an apparent exception to the general rule. In the maxim, "Ignorantia juris haud excusat,"

Twose, 14 Cox Cr. Cas. 327; *State v. McKinney*, 42 Iowa, 205; *Cutter v. State*, 36 N. J. Law, 125.

<sup>456</sup> *Wills v. Noyes*, 12 Pick. (Mass.) 324.

<sup>457</sup> *Grumon v. Raymond*, 1 Conn. 40, 48; *Patterson v. Prior*, 18 Ind. 440, 81 A. D. 367.

<sup>458</sup> *Hammon*, Cont. §§ 92-105.

<sup>459</sup> *Hunter v. Walters*, 7 Ch. App. 75; *Hunt v. Rhodes*, 1 Pet. (U. S.) 1; *Upton v. Tribilcock*, 91 U. S. 45, 50; *Wheaton v. Wheaton*, 9 Conn. 96; *State v. Van Pelt, Smith* (Ind.) 118; *Mears v. Graham*, 8 Blackf. (Ind.) 144; *Gist v. Drakely*, 2 Gill (Md.) 330, 41 A. D. 426; *Taylor v. Buttrick*, 165 Mass. 547, 52 A. S. R. 530; *Rice v. Dwight Mfg. Co.*, 2 Cush. (Mass.) 80; *Harris v. Smith*, 40 Mich. 453; *Phillip v. Gallant*, 62 N. Y. 256; *Mellish v. Robertson*, 25 Vt. 603.

the word "jus" is used in the sense of denoting general law,—the ordinary law of the country. When the word "jus" is used in the sense of denoting a private right, depending upon questions of mixed law and fact, or upon the true construction of a particular instrument, that maxim has no application. Accordingly, if an apparent agreement is entered into under a mutual mistake of the parties as to their relative and respective rights, either party is entitled to have the agreement set aside, since ignorance of particular private rights is equivalent to ignorance of fact.<sup>460</sup> Ignorance or mistake as to private rights is of two kinds: First, ignorance or mistake in point of fact as to the existence or nonexistence of any right or title in the party; and, second, all the facts being known, ignorance or misapprehension of the law having application to those facts.<sup>461</sup> As to the first kind, if an apparent contract is made in ignorance of the fact of the existence of a right or title which forms the subject-matter of the agreement, then the agreement is void, even though the error results from mistake of law.<sup>462</sup> And a contract is defeated, also, where the parties, erroneously supposing a right or title to exist, enter into an agreement concerning the same.<sup>463</sup> As to the

<sup>460</sup> Hammon, Cont. § 102; Bingham v. Bingham, 1 Ves. Sr. 126; Broughton v. Hutt, 3 De Gex & J. 501; Cooper v. Phibbs, L. R. 2 H. L. 149, 170; Jones v. Clifford, 3 Ch. Div. 779; Earl Beauchamp v. Winn, L. R. 6 H. L. 223; Baker v. Massey, 50 Iowa, 399, 404; Neal v. Curn, 92 Me. 139, 69 A. S. R. 495; King v. Doolittle, 1 Head (Tenn.) 77; Toland v. Corey, 6 Utah, 392; Webb v. Alexandria City Council, 33 Grat. (Va.) 168, 175, 176.

<sup>461</sup> Story, Eq. Jur. §§ 122, 130; Trigg v. Read, 5 Humph. (Tenn.) 528, 533, 537.

<sup>462</sup> Story, Eq. Jur. § 122; Trigg v. Read, 5 Humph. (Tenn.) 528, 536.

<sup>463</sup> Blakeman v. Blakeman, 39 Conn. 320; Fitzgerald v. Peck, 4 Litt. (Ky.) 125; Martin v. McCormick, 8 N. Y. 331; Gross v. Leber, 47 Pa. 520; Lawrence v. Beaubien, 2 Balley (S. C.) 623; King v. Doolittle, 1 Head (Tenn.) 77. But see Birkhauser v. Schmitt, 45 Wis. 316. And see Broughton v. Hutt, 3 De Gex & J. 501.



second kind, the rule, as settled in the United States, is that ignorance or misapprehension of the law, whether or not the principles are plain and settled, and a consequent mistake as to private right or title, does not avoid the contract, if the party had full knowledge of the facts constituting his right or title.<sup>464</sup>

While a renunciation of rights under a mistake as to particular applications of the law is not conclusive, the deliberate renunciation or compromise of doubtful rights is, of course, binding.<sup>465</sup> And if a compromise is deliberately entered into upon advice, the party's advisers having the question fully before them, the contract cannot be set aside because a particular point of law was mistaken or overlooked.<sup>466</sup>

— (1) **Misrepresentation of law.** As a rule, a misrepresentation of law will not found an action for deceit; nor can a party avoid a contract as for fraud because he was induced to enter into it by a false statement of its legal effect.<sup>467</sup> This rule

<sup>464</sup> Story, Eq. Jur. § 120; *Bank of U. S. v. Daniel*, 12 Pet. (U. S.) 32; *Good v. Herr*, 7 Watts & S. (Pa.) 253; *Trigg v. Read*, 5 Humph. (Tenn.) 528, 533, 535; *Osburn v. Throckmorton*, 90 Va. 311; *Birkhauser v. Schmitt*, 45 Wis. 316. *Contra*, *Lowndes v. Chisholm*, 2 McCord Eq. (S. C.) 455. And see *Warder v. Tucker*, 7 Mass. 449, 5 A. D. 62.

It is often otherwise in equity, where the mistake was mutual. *Champlin v. Laytin*, 6 Paige (N. Y.) 189.

<sup>465</sup> *Hammon*, Cont. §§ 102, 338; Story, Eq. Jur. §§ 121, 131; *Rogers v. Ingham*, 3 Ch. Div. 351; *Cann v. Cann*, 1 P. Wms. 723, 727; *Union Bank v. Geary*, 5 Pet. (U. S.) 99, 114; *Stover v. Mitchell*, 45 Ill. 213; *Trigg v. Read*, 5 Humph. (Tenn.) 528, 534, 543; *Smith v. Penn*, 22 Grat. (Va.) 402.

<sup>466</sup> *Stewart v. Stewart*, 6 Clark & F. 911.

<sup>467</sup> *Lewis v. Jones*, 4 Barn. & C. 506; *Mut. L. Ins. Co. v. Phinney*, 178 U. S. 327, 44 L. Ed. 1088; *Upton v. Tribilcock*, 91 U. S. 45; *Martin v. Wharton*, 38 Ala. 637; *People v. San Francisco Sup'rs*, 27 Cal. 855; *Cooper v. Hunter*, 8 Colo. App. 101; *Fish v. Cleland*, 33 Ill. 238; *Drake v. Latham*, 50 Ill. 270; *Ind. Ins. Co. v. Brehm*, 88 Ind. 578; *Clem v. N. & D. R. Co.*, 9 Ind. 488, 68 A. D. 653; *Thompson v. Phoenix*

does not apply in all cases, however. The circumstances and the position of the parties are sometimes such as to justify the one in relying upon the representations of the other as to the law,<sup>468</sup> as where the parties stand in a relation of confidence,<sup>469</sup> or where one, by reason of his unfamiliarity with legal transactions, is compelled to rely upon the superior knowledge of the other.<sup>470</sup> In determining when a misrepresentation is of a matter of law, and when of a matter of fact, we are confronted with the same difficulty as that which we met in considering mistake of law and mistake of fact. What was said there doubtless applies here.<sup>471</sup>

— **Ratification of contract.** As to whether a man must have actual knowledge of his legal right to avoid a contract made in infancy in order to bind himself by ratification, the cases are in conflict. One line of cases holds that there can

Ins. Co., 75 Me. 55; *Jaggar v. Winslow*, 30 Minn. 263; *Wood v. Roeder*, 50 Neb. 476; *Starr v. Bennett*, 5 Hill (N. Y.) 303; *Unckles v. Hentz*, 18 Misc. (N. Y.) 644; *Aetna Ins. Co. v. Reed*, 33 Ohio St. 283; *Gormely v. Gymnastic Ass'n*, 55 Wis. 350. See, however, *Ross v. Drinkard's Adm'r*, 35 Ala. 434.

Misrepresentation of law may afford ground for relief in equity. *State v. Paup*, 13 Ark. 129, 56 A. D. 303; *Tyson v. Passmore*, 2 Pa. 122, 44 A. D. 181; *Brown v. Rice's Adm'r*, 26 Grat. (Va.) 467.

Misrepresentation of foreign law is misrepresentation of fact, and may, at law, avoid a contract made in reliance on it. *Bethell v. Bethell*, 92 Ind. 318.

<sup>468</sup> But see *Hirschfeld v. L. B. & S. C. R. Co.*, 2 Q. B. Div. 1.

<sup>469</sup> *Townsend v. Cowles*, 31 Ala. 428; *Sims v. Ferrill*, 45 Ga. 585; *Stumpf v. Stumpf*, 7 Mo. App. 272; *Allen v. Frawley*, 106 Wis. 633.

<sup>470</sup> *Lehman v. Shackelford*, 50 Ala. 437; *Ross v. Drinkard's Adm'r*, 35 Ala. 434; *Kinney v. Dodge*, 101 Ind. 573; *Berry v. Whitney*, 40 Mich. 65; *Cooke v. Nathan*, 16 Barb. (N. Y.) 342; *Moreland v. Atchison*, 19 Tex. 303.

<sup>471</sup> See page 219, *supra*. Whether a particular piece of land is covered by a deed of conveyance is ordinarily a question of fact, not of law. *Dashiel v. Harshman*, 113 Iowa, 283. Whether certain goods have been levied upon is ordinarily a question of fact. *Burns v. Lane*, 138 Mass. 350.

be no ratification without intelligent action as to the law as well as to the facts, and, accordingly, that, if a man does not know that he has a right to disaffirm a contract made in infancy, no act done with reference to that contract may charge him as by ratification.<sup>472</sup> By the better-reasoned opinions, however, the contrary view is taken. The right to disaffirm a contract made in infancy is, they hold, a matter of law, of which all men are conclusively presumed to have knowledge. A man's ignorance of the law in this respect may not, therefore, be proved; and accordingly, by promising, either expressly or impliedly, to perform a contract entered into while a minor, a man ratifies the contract, and makes it binding upon him in spite of the fact that, in truth, he does not know that the contract is voidable.<sup>473</sup>

There is a conflict in regard to this same question in its relation to contracts made by persons non compotes mentis.

<sup>472</sup> *Harmer v. Killing*, 5 Esp. 102; *Tucker's Lessee v. Moreland*, 10 Pet. (U. S.) 58, 76; *Burdett v. Williams*, 30 Fed. 697; *Sayles v. Christie*, 187 Ill. 420; *Fetrow v. Wiseman*, 40 Ind. 148; *Thing v. Libbey*, 16 Me. 55, 57; *Trader v. Lowe*, 45 Md. 1; *Baker v. Kennett*, 54 Mo. 82; *Bresee v. Stanly*, 119 N. C. 278; *Turner v. Gaither*, 83 N. C. 357; *Hinely v. Margaritz*, 3 Pa. 428; *Curtin v. Patton*, 11 Serg. & R. (Pa.) 305; *Norris v. Vance*, 3 Rich. Law (S. C.) 165; *Reed v. Boshears*, 4 Sneed (Tenn.) 117. See, however, *Ogborn v. Hoffman*, 52 Ind. 439.

The presumption of fact is that the former infant is aware of his rights. *Hatch v. Hatch's Estate*, 60 Vt. 160.

<sup>473</sup> *American Mortg. Co. v. Wright*, 101 Ala. 658; *Bestor v. Hickey*, 71 Conn. 181; *Middleton v. Hoge*, 5 Bush (Ky.) 478, 490; *Morse v. Wheeler*, 4 Allen (Mass.) 570, overruling *Smith v. Mayo*, 9 Mass. 62, 64, and *Ford v. Phillips*, 1 Pick. (Mass.) 202, 203; *Taft v. Sergeant*, 18 Barb. (N. Y.) 320; *Anderson v. Soward*, 40 Ohio St. 325. See, also, *Bentley v. Greer*, 100 Ga. 35; *Ihley v. Padgett*, 27 S. C. 304. In *Owen v. Long*, 112 Mass. 403, there is a slight implication to the contrary, but the point was not necessarily involved in the decision, and it cannot be thought that the court there intended to overrule, without mention, the previous extended and well-reasoned opinion given in *Morse v. Wheeler*, *supra*.

Some courts hold that ignorance of the right to disaffirm the contract upon recovery of mental ability prevents a ratification,<sup>474</sup> while other courts take the contrary and better opinion.<sup>475</sup>

With reference to *cestuis que trustent* it is held that they are not bound as by ratification of an unauthorized investment of the trust funds unless they were first fully apprised of their right to avoid the transaction.<sup>476</sup>

— **Legality of contract.** As to the effect of this so-called presumption on the legality of contracts, it may be said that if an agreement has an unlawful object, and the parties are fully acquainted with the facts entering into the transaction, the compact is void, even though, through ignorance or mistake of the law governing the matter, the parties do not know of the illegality, or intend to break the law. Ignorance or mistake of law does not excuse them, so as to give effect to their agreement.<sup>477</sup>

#### § 54. Terms of foreign law.

It will be seen that the courts cannot take judicial notice of the laws of a foreign state, whence it follows that they must be proved as matter of fact.<sup>478</sup> In aid of such proof, certain presumptions as to the terms of foreign laws are in some cases indulged by the domestic courts.<sup>479</sup> These presump-

<sup>474</sup> *Eaton v. Eaton*, 37 N. J. Law, 108, 119.

<sup>475</sup> *Arnold v. Richmond Iron Works*, 1 Gray (Mass.) 434. •

<sup>476</sup> *Adair v. Brimmer*, 74 N. Y. 539.

<sup>477</sup> *Hammon*, Cont. § 249; *Waugh v. Morris*, L. R. 8 Q. B. 202, 208; *Wilkinson v. Loudonsack*, 3 Maule & S. 117, 126; *Daniels v. Barney*, 22 Ind. 207; *Saratoga County Bank v. King*, 44 N. Y. 87, 92.

<sup>478</sup> Section 105(a), *infra*.

Presumption of knowledge of foreign law, see note 451, *supra*.

<sup>479</sup> Sister states of the Union, as well as England, are foreign states,

tions are not rules governing in case of conflict of laws, in the strict sense of that term.<sup>480</sup> They all assume that the rights and liabilities of the parties were created with reference to the law of a foreign state, so that, if that law were proved, it, in preference to the domestic law, would properly be applied to the case at bar.

The cases dealing with these presumptions are to be distinguished in two respects: First, as to whether the presumption affects common law or statutory law; and, second, as to whether or not a common system of judicature (that is, as to whether or not the common law or the Roman law) prevails in the foreign state and the state of the forum. And it is apt to observe in this connection that the domestic courts will take judicial notice of whether or not the system of judicature which it administers prevails in a particular foreign

within the meaning of the rule giving rise to these presumptions. *Wickersham v. Johnston*, 104 Cal. 407, 43 A. S. R. 118.

It will be seen that foreign law, once ascertained in the domestic courts, is presumed to continue the same until evidence to the contrary is adduced. Section 105(b), *infra*.

<sup>480</sup> Leaving, for the moment, the subject under discussion, it may be noted that there is a so-called presumption which the courts sometimes employ in determining whether the *lex loci contractus* or the *lex solutionis* applies to the case in hand. If a contract is to be wholly performed in a foreign state, a presumption is said to arise that the parties intended that their rights and liabilities under the agreement should be governed by the law of that state. *Hammon*, Cont. § 261; *Robinson v. Bland*, 2 Burrow, 1077; *Hawley v. Bibb*, 69 Ala. 52; *Lewis v. Headley*, 36 Ill. 433, 87 A. D. 227; *Bigelow v. Burnham*, 90 Iowa, 300, 48 A. S. R. 442; *Tyler v. Trabue*, 8 B. Mon. (Ky.) 306; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191, 3 A. D. 535; *Martin v. Martin*, 1 Smedes & M. (Miss.) 176; *Hill v. Spear*, 50 N. H. 253, 9 A. R. 205; *Ormes v. Dauchy*, 82 N. Y. 443, 37 A. R. 583; *Com. v. Bassford*, 6 Hill (N. Y.) 526; *Tenant v. Tenant*, 110 Pa. 478; *Cent. Trust Co. v. Burton*, 74 Wis. 329. This matter, however, has nothing to do with the presumptions under discussion in the text. See, generally, 7 Current Law, 680.

state,<sup>481</sup> and also of whether or not the common law of the forum has been abrogated or modified by statute.<sup>482</sup>

(a) **Common law.** First, of the common law, in its broad sense, unaffected by statute. In the absence of evidence of the law of a foreign state, it is presumed to coincide with the common law of the forum,<sup>483</sup> unless different systems of judica-

<sup>481</sup> See § 105(b), *infra*.

It has been held in Maine that there is no presumption that the common law prevails in New Brunswick. *Owen v. Boyle*, 15 Me. 147, 32 A. D. 143.

<sup>482</sup> See § 100(b), *infra*.

<sup>483</sup> *Administration.* *Newton v. Cocke*, 10 Ark. 169; *Rogers v. Zook*, 86 Ind. 237; *Peterson v. Chemical Bank*, 32 N. Y. 21, 88 A. D. 298.

*Carriers.* *Eureka Springs R. v. Timmons*, 51 Ark. 459; *Hudson v. N. P. R. Co.*, 92 Iowa, 231, 54 A. S. R. 550; *East Omaha St. R. Co. v. Godola*, 50 Neb. 906.

*Champertry.* *Miles v. Collins*, 1 Metc. (Ky.) 308; *Thurston v. Percival*, 1 Pick. (Mass.) 415.

*Conditions precedent.* *Musser v. Stauffer*, 178 Pa. 99.

*Conveyances.* *Robards v. Marley*, 80 Ind. 185.

*Covenants.* *Bethell v. Bethell*, 92 Ind. 318.

*Death by wrongful act.* *Palfrey v. P., S. & P. R. Co.*, 4 Allen (Mass.) 55.

*Devolution of property.* *Reese v. Harris*, 27 Ala. 301.

*Gambling contracts.* *Harvey v. Merrill*, 150 Mass. 1, 15 A. S. R. 159; *Mohr v. Miesen*, 47 Minn. 228; *Ruse v. Mut. B. L. Ins. Co.*, 23 N. Y. 516, 522.

*Gifts.* *Connor v. Traulick's Adm'r*, 37 Ala. 289, 79 A. D. 58.

*Judgments.* *Thompson v. Monrow*, 2 Cal. 99, 56 A. D. 318; *Engstrand v. Kleffman*, 86 Minn. 403, 91 A. S. R. 359; *Holmes v. Broughton*, 10 Wend. (N. Y.) 75, 25 A. D. 536; *Thomas v. Pendleton*, 1 S. D. 150, 36 A. S. R. 726; *Osborn v. Blackburn*, 78 Wis. 209, 23 A. S. R. 400.

*Marriage and divorce.* *Trimble v. Trimble*, 2 Ind. 76; *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460, 22 A. D. 41, 69; *Com. v. Kenney*, 120 Mass. 387; *Com. v. Graham*, 157 Mass. 73, 34 A. S. R. 255; *Kelley v. Kelley*, 161 Mass. 111, 42 A. S. R. 389; *People v. Loomis*, 106 Mich. 250; *Jones v. Reddick*, 79 N. C. 290; *State v. Shattuck*, 69 Vt. 403, 60 A. S. R. 936.

*Married women.* *Holthaus v. Farris*, 24 Kan. 784; *Benne v. Schnecko*, 100 Mo. 250; *Cressey v. Tatom*, 9 Or. 541.

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ture prevail in the foreign state and the domestic state, in which case the presumption does not arise.<sup>484</sup> In either event, however, the result is the same: the rights of the parties are adjusted, if at all, necessarily by the law of the forum, so that the question whether a presumption arises in either of these cases is purely academical. The so-called presumption is therefore merely a rule of remedial law to the effect that, in the absence of evidence of a foreign law which would other-

*Master and servant.* Ala. G. S. R. Co. v. Carroll, 97 Ala. 126, 38 A. S. R. 163; Baltimore & O. S. W. R. Co. v. Reed, 158 Ind. 25, 56 L. R. A. 468; St. Louis & S. F. R. Co. v. Weaver, 35 Kan. 412, 57 A. R. 176; Crandall v. G. N. R. Co., 83 Minn. 190, 85 A. S. R. 458; Burdict v. Mo. Pac. R. Co., 123 Mo. 221, 45 A. S. R. 528.

*Negotiable instruments.* Dunn v. Adams, 1 Ala. 527, 35 A. D. 42; State v. Cobb, 64 Ala. 127, 156; Bemis v. McKenzie, 13 Fla. 553; Pattillo v. Alexander, 96 Ga. 60, 29 L. R. A. 616; Crouch v. Hall, 15 Ill. 263; Dubois v. Mason, 127 Mass. 37, 34 A. R. 335; Schultz v. Howard, 63 Minn. 196, 56 A. S. R. 470.

*Payment.* Ely v. James, 123 Mass. 36.

*Vendor's lien.* Hill v. Grigsby, 32 Cal. 55.

By the better opinion, the presumption of the existence of the common law in a foreign state precludes any presumption that the statutes of the two states are the same. If, therefore, the common law does not give a party a right and a remedy, and the law of a foreign state properly governs the case, he must prove the existence of a foreign statute entitling him to relief. The fact that such a statute exists in the state of the forum does not aid him. See page 229, *infra*.

<sup>484</sup> Peet v. Hatcher, 112 Ala. 514, 57 A. S. R. 45; Brown v. Wright, 58 Ark. 20, 21 L. R. A. 467; Du Val v. Marshall, 30 Ark. 230; Norris v. Harris, 15 Cal. 226; Flato v. Mulhall, 72 Mo. 522; Savage v. O'Neil, 44 N. Y. 298. And see St. Sure v. Lindsfelt, 82 Wis. 346, 33 A. S. R. 50. *Contra*, Hynes v. McDermott, 82 N. Y. 41, 37 A. R. 538.

It is not presumed that the law merchant as enforced in all its details in Massachusetts prevails in Turkey. Aslanian v. Dostumian, 174 Mass. 328, 75 A. S. R. 348. It is presumed to prevail in Louisiana, however. Cribbs v. Adams, 13 Gray (Mass.) 597.

It has been suggested that the presumption is that a man is everywhere entitled to personal freedom and security, regardless of similarity in the systems of judicature. Whitford v. P. R. Co., 23 N. Y. 465; Leonard v. Columbia S. N. Co., 84 N. Y. 48, 38 A. R. 491. And acts

wise govern the rights of the parties, those rights shall be determined by the law of the forum.<sup>485</sup>

(b) **Statutory law.** Second, of statutory law. The cases falling under this head are in conflict.<sup>486</sup> By the better opinion, if the law of the forum, in its application to the point in question, is governed by statute, the presumption of identity of foreign and domestic law does not arise. It is not presumed that a foreign state has enacted statutes like those prevailing

which are crimes in the state of the forum as being *malum in se* will be presumed to be crimes in all civilized countries, without reference to the system of judicature there prevailing. *Cluff v. Mut. B. L. Ins. Co.*, 13 Allen (Mass.) 308. It is also presumed that a marriage by consent of capable parties is valid everywhere without any formalities. *Laurence v. Laurence*, 164 Ill. 367; *Hutchins v. Kimmell*, 31 Mich. 126, 18 A. R. 164. With stronger reason it is presumed that a marriage is valid everywhere if it is solemnized by a priest and followed by cohabitation. *Com. v. Kenney*, 120 Mass. 387.

<sup>485</sup> *Lloyd v. Guilbert*, L. R. 1 Q. B. 115, 129; *Peet v. Hatcher*, 112 Ala. 514, 57 A. S. R. 45; *Cox v. Morrow*, 14 Ark. 603, 613; *Norris v. Harris*, 15 Cal. 226; *Simms v. Southern Exp. Co.*, 38 Ga. 129; *Dannelli v. Dannelli's Adm'r*, 4 Bush (Ky.) 51; *Carpenter v. G. T. R. Co.*, 72 Me. 388, 39 A. R. 340; *Monroe v. Douglass*, 5 N. Y. 447; *McBride v. Farmers' Bank*, 26 N. Y. 450, 457; *Savage v. O'Neil*, 44 N. Y. 298; *Hynes v. McDermott*, 82 N. Y. 41, 37 A. R. 538; *James v. James*, 81 Tex. 373, 381. And see *Norman v. Norman*, 121 Cal. 620, 42 L. R. A. 343, 346.

As to whether, in this event, the rights of the parties shall be determined by the common law of the forum, or by its statutory law, see page 229, *infra*.

Where the foreign law is relied on, not as furnishing a rule for the adjustment of the rights of the parties, but merely as a collateral circumstance upon which an argument is founded, as where, for instance, it has a bearing on the construction of a contract in suit, then the question whether a presumption exists is not merely *academical*, but vital, so far as the validity of the argument is concerned. *Aslanian v. Dostumian*, 174 Mass. 328, 75 A. S. R. 348.

<sup>486</sup> A conflict exists, not only between the courts of different states, but also, in some jurisdictions, between different cases decided in the same state. This seems to be true of Arkansas, California, Minnesota, South Dakota, and Wisconsin. The cases are cited in the following notes.



in the forum.<sup>487</sup> So far as the rule itself is concerned, it is the same, whether or not a common system of judicature pre-

<sup>487</sup> *Carriers.* The Henry B. Hyde, 82 Fed. 681; Carpenter v. G. T. R. Co., 72 Me. 388, 39 A. R. 340; Meuer v. C., M. & St. P. R. Co., 11 S. D. 94, 74 A. S. R. 774.

*Corporations.* Vanderpoel v. Gorman, 140 N. Y. 563, 37 A. S. R. 601.

*Costs.* Kelley v. Kelley, 161 Mass. 111, 42 A. S. R. 389.

*Criminal law.* Bundy v. Hart, 46 Mo. 460, 2 A. R. 525.

*Death by wrongful act.* Louisville & N. R. Co. v. Williams, 113 Ala. 402; Allen v. P. & C. R. Co., 45 Md. 41; Myers v. C., St. P., M. & O. R. Co., 69 Minn. 476, 65 A. S. R. 579; McDonald v. Mallory, 77 N. Y. 546, 33 A. R. 664; Leonard v. Columbia S. N. Co., 84 N. Y. 48, 38 A. R. 491 (semble).

*Frauds, statute of.* Miller v. Wilson, 146 Ill. 523, 37 A. S. R. 186; Ellis v. Maxson, 19 Mich. 186, 2 A. R. 81; Houghtaling v. Ball, 19 Mo. 84, 59 A. D. 331.

*Gaming and lottery contracts.* Peet v. Hatcher, 112 Ala. 514, 57 A. S. R. 45; Flagg v. Baldwin, 38 N. J. Eq. 219, 48 A. R. 308; Ormes v. Dauchy, 82 N. Y. 443, 37 A. R. 583; Harris v. White, 81 N. Y. 532; Gooch v. Faucette, 122 N. C. 270, 39 L. R. A. 835.

*Interest.* Thompson v. Monrow, 2 Cal. 99, 56 A. D. 318 (semble); Kermott v. Ayer, 11 Mich. 181.

*Justices of the peace.* Crake v. Crake, 18 Ind. 156.

*Limitation of actions.* Eingartner v. Ill. Steel Co., 94 Wis. 70, 34 L. R. A. 503 (semble).

*Marriage and divorce.* Kelley v. Kelley, 161 Mass. 111, 42 A. S. R. 389; State v. Shattuck, 69 Vt. 403, 60 A. S. R. 936.

*Married women.* Birmingham W. W. Co. v. Hume, 121 Ala. 168, 77 A. S. R. 43; Cahalan v. Monroe, 70 Ala. 271; Hydrick v. Burke, 30 Ark. 124; Tinkler v. Cox, 68 Ill. 119; Lichtenberger v. Graham, 50 Ind. 288; State v. Clay, 100 Mo. 571; Savage v. O'Neill, 44 N. Y. 298.

*Master and servant.* Baltimore & O. S. W. R. Co. v. Read, 158 Ind. 87, 56 L. R. A. 468.

*Negotiable instruments.* Dunn v. Adams, 1 Ala. 527, 35 A. D. 42; Lucas v. Ladew, 28 Mo. 342.

*Seduction.* Buckles v. Ellers, 72 Ind. 220, 37 A. R. 156.

*Sunday contracts.* Murphy v. Collins, 121 Mass. 6; Adams v. Gay, 19 Vt. 358.

*Survival of actions.* O'Reilly v. N. Y. & N. E. R. Co., 16 R. I. 388.

*Trusts.* First Nat. Bank v. Nat. Broadway Bank, 156 N. Y. 459, 42 L. R. A. 139.

vails in the two countries;<sup>488</sup> but in adjusting the rights of the parties, the question of the identity of the systems of judicature becomes material. If the systems are the same, the presumption is, as we have seen, that the common law, unaffected by statute, prevails in the foreign state, and, there being no presumption of identity of statutory law, the rights of the parties are adjusted according to the common law as it would prevail in the forum in the absence of statute.<sup>489</sup>

*Usury.* Grider v. Driver, 46 Ark. 50; White v. Friedlander, 35 Ark. 52; Smith v. Whitaker, 23 Ill. 367; Smith v. Muncie Nat. Bank, 29 Ind. 158; Cutler v. Wright, 22 N. Y. 472; Commission Co. v. Carroll, 104 Tenn. 489; Hull v. Augustine, 23 Wis. 383.

<sup>488</sup> Whitford v. P. R. Co., 23 N. Y. 465. *Contra*, Peet v. Hatcher, 112 Ala. 514, 57 A. S. R. 45.

<sup>489</sup> UNITED STATES: The Henry B. Hyde, 82 Fed. 681.

ALABAMA: Cahalan v. Monroe, 70 Ala. 271; Connor v. Trawick's Adm'r, 37 Ala. 289, 79 A. D. 58; Birmingham W. W. Co. v. Hume, 121 Ala. 168, 77 A. S. R. 43; Dunn v. Adams, 1 Ala. 527, 35 A. D. 42.

ARKANSAS: White v. Friedlander, 35 Ark. 52; Grider v. Driver, 46 Ark. 50; Hydrick v. Burke, 30 Ark. 124.

CALIFORNIA: Thompson v. Monrow, 2 Cal. 99, 56 A. D. 318 (semble).

ILLINOIS: Miller v. Wilson, 146 Ill. 523, 37 A. S. R. 186; Smith v. Whitaker, 23 Ill. 367; Tinkler v. Cox, 68 Ill. 119.

INDIANA: Smith v. Muncie Nat. Bank, 29 Ind. 158; Lichtenberger v. Graham, 50 Ind. 288.

MASSACHUSETTS: Murphy v. Collins, 121 Mass. 6; Kelley v. Kelley, 161 Mass. 111, 42 A. S. R. 389.

MICHIGAN: Ellis v. Maxson, 19 Mich. 186, 2 A. R. 81.

MINNESOTA: Myers v. C., St. P., M. & O. R. Co., 69 Minn. 476, 65 A. S. R. 579.

MISSOURI: Lucas v. Ladew, 28 Mo. 342; State v. Clay, 100 Mo. 571; Bundy v. Hart, 46 Mo. 460, 2 A. R. 525.

NEW YORK: Cutler v. Wright, 22 N. Y. 472 (semble); First Nat. Bank v. Nat. Broadway Bank, 156 N. Y. 459, 42 L. R. A. 139.

TENNESSEE: Commission Co. v. Carroll, 104 Tenn. 489.

VERMONT: State v. Shattuck, 69 Vt. 403, 60 A. S. R. 936.

WISCONSIN: Hull v. Augustine, 23 Wis. 383; Eingartner v. Ill. Steel Co., 94 Wis. 70, 34 L. R. A. 503.

If, however, the systems of judicature prevailing in the two states are not the same, a presumption that the common law obtains in the foreign state does not arise, as we have seen, and the rights of the parties are therefore necessarily adjusted according to the law of the forum, even though that law consists of statutes.<sup>490</sup>

These views, however, do not prevail in all states. In some jurisdictions it is held that, in the absence of evidence on the subject, the presumption is that the statutory law of another state is identical with that of the state of the forum, and that the rights of the parties are therefore in all cases, without reference to whether or not the same system of judicature prevails in the two states, to be adjusted by the law of the forum, even though it consists of statutes.<sup>491</sup> And the same result is sometimes reached without reference to the existence of any presumption; the ground of decision being

The rights of the plaintiff, assuming that he has rights at common law, will not be enforced according to that law, however, if the transaction in suit is illegal by statute of the forum. *Hill v. Wilker*, 41 Ga. 449, 5 A. R. 540 (semble); *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 A. R. 308; *Gooch v. Faucette*, 122 N. C. 270, 39 L. R. A. 835; *Gist v. W. U. Tel. Co.*, 45 S. C. 344, 55 A. S. R. 763, 771. *Contra*, *Peet v. Hatcher*, 112 Ala. 514, 57 A. S. R. 45 (semble).

<sup>490</sup> *Peet v. Hatcher*, 112 Ala. 514, 57 A. S. R. 45; *Brown v. Wright*, 58 Ark. 20, 21 L. R. A. 467; *Atkinson v. Atkinson*, 15 La. Ann. 491; *Flato v. Mulhall*, 72 Mo. 522; *Savage v. O'Neil*, 44 N. Y. 298.

The decision in the following cases might be justified on this theory: *Cavallaro v. Tex. & P. R. Co.*, 110 Cal. 348, 52 A. S. R. 94; *Norris v. Harris*, 15 Cal. 226; *Roehl v. Porteous*, 47 La. Ann. 1582; *St. Sure v. Lindsfelt*, 82 Wis. 346, 33 A. S. R. 50.

<sup>491</sup> *Administration*. *Wickersham v. Johnston*, 104 Cal. 407, 43 A. S. R. 118; *Green v. Rugely*, 23 Tex. 539 (semble).

*Carriers*. *Cavallaro v. Tex. & P. R. Co.*, 110 Cal. 348, 52 A. S. R. 94; *Meuer v. C. M. & St. P. R. Co.*, 5 S. D. 568, 49 A. S. R. 898.

*Corporations*. *German Bank v. American F. Ins. Co.*, 83 Iowa, 491.

that, in the absence of evidence of the foreign law which would otherwise govern the case, the rights of the parties are necessarily adjusted according to the law of the forum, even though it be statutory.<sup>492</sup>

32 A. S. R. 316; *Chapman v. Brewer*, 43 Neb. 890, 47 A. S. R. 779; *Temple v. Dodge*, 89 Tex. 68.

*Fraudulent conveyances.* *Hickman v. Alpaugh*, 21 Cal. 225.

*Guardians.* *Norris v. Harris*, 15 Cal. 226.

*Insurance.* *Goodwin v. Provident S. L. A. Ass'n*, 97 Iowa, 226, 59 A. S. R. 411; *Fisher v. Donovan*, 57 Neb. 361, 44 L. R. A. 383.

*Interest.* *Cooper v. Reaney*, 4 Minn. 528; *Fitzgerald v. Fitzgerald & M. Const. Co.*, 41 Neb. 374, 472; *Nat. G. A. Bank v. Lang*, 2 N. D. 66 (semble).

*Judgments.* *Thomas v. Pendelton*, 1 S. D. 150, 36 A. S. R. 726; *Osborn v. Blackburn*, 78 Wis. 209, 23 A. S. R. 400 (semble).

*Limitation of actions.* *Scroggin v. McClelland*, 37 Neb. 644, 40 A. S. R. 520; *Evans v. Cleary*, 125 Pa. 204, 11 A. S. R. 886.

*Marriage.* *Haggin v. Haggin*, 35 Neb. 375.

*Married women.* *Bollinger v. Gallagher*, 144 Pa. 205; *James v. James*, 81 Tex. 373, 381 (semble).

*Mortgages.* *Hall v. Pillow*, 31 Ark. 32; *Roehl v. Porteous*, 47 La. Ann. 1582; *Morris v. Hubbard*, 10 S. D. 259 (semble).

*Negotiable instruments.* *Walsh v. Dart*, 12 Wis. 635.

*Notaries public.* *Neese v. Farmers' Ins. Co.*, 55 Iowa, 604; *Goodnow v. Litchfield*, 67 Iowa, 691; *Welton v. Atkinson*, 55 Neb. 674, 70 A. S. R. 416.

*Notice as condition precedent to suit.* *Burgess v. W. U. Tel. Co.*, 92 Tex. 125, 71 A. S. R. 833.

*Service of process.* *Rape v. Heaton*, 9 Wis. 328, 76 A. D. 269.

*Sunday contracts.* *Hill v. Wilker*, 41 Ga. 449, 5 A. R. 540; *Sayre v. Wheeler*, 31 Iowa, 112, 32 Iowa, 559; *Brimhall v. Van Campen*, 8 Minn. 13, 82 A. D. 118.

<sup>492</sup> *Cox v. Morrow*, 14 Ark. 603, 613; *Palmer v. A., T. & S. F. R. Co.*, 101 Cal. 187; *Mortimer v. Marder*, 93 Cal. 172; *Crafts v. Clark*, 38 Iowa, 237; *Wheeler v. Constantine*, 39 Mich. 62, 33 A. R. 355;

## M. LEGALITY.

§ 55. The presumption of legality is to be distinguished from the presumptions of innocence and of regularity, which are considered in other connections.<sup>493</sup>

Generally speaking, the courts refuse to indulge in any presumption that the law has been violated<sup>494</sup> or will be violated in the future<sup>495</sup> by any particular person in any particular

*Gist v. W. U. Tel. Co.*, 45 S. C. 344, 55 A. S. R. 763; *Meuer v. C. M. & St. P. R. Co.*, 11 S. D. 94, 74 A. S. R. 774. And see *Bollinger v. Gallagher*, 144 Pa. 205; *James v. James*, 81 Tex. 373, 381.

<sup>493</sup> Presumption of fraud, duress, and undue influence, see §§ 43-45, *supra*. Presumption of regularity, see §§ 23-30, *supra*. Presumption of innocence, see §§ 49, 50, *supra*.

<sup>494</sup> Presumption against abandonment of family. *Jennison v. Hapgood*, 10 Pick. (Mass.) 77, 98. See, however, *State v. Schweitzer*, 57 Conn. 532, 6 L. R. A. 125. Against contempt of court. *Scholes v. Hilton*, 10 Mees. & W. 15. That candidate was qualified. *King v. Hawkins*, 10 East, 211, 216. Against violation of National Banking Act. *Richards v. Kountze*, 4 Neb. 200. Against nonpayment of corporate tax. *Peck v. Elliott*, 47 U. S. App. 605, 38 L. R. A. 616. That foreign corporation has complied with statutory conditions precedent to doing business. 1 *Clark & M. Corp.* § 847; *Knapp, S. & C. Co. v. Nat. M. F. Ins. Co.*, 30 Fed. 607; *Nelms v. Edinburgh A. L. Mortg. Co.*, 92 Ala. 157; *Sprague v. Cutler & S. L. Co.*, 106 Ind. 242; *Fidelity, etc., Co. v. Eickhoff*, 63 Minn. 170, 56 A. S. R. 464; *American Ins. Co. v. Smith*, 73 Mo. 368. See, however, *Wash. County M. Ins. Co. v. Chamberlain*, 16 Gray (Mass.) 165.

Presumption against perjury. *Matthews v. Lanier*, 33 Ark. 91; *Hewlett v. Hewlett*, 4 Edw. Ch. (N. Y.) 7; *Jackson v. State*, 33 Tex. Cr. R. 281, 47 A. S. R. 30. Against illegal sales of liquor. *Timson v. Moulton*, 3 Cush. (Mass.) 269; *Jones v. McLeod*, 103 Mass. 58; *Horan v. Weiler*, 41 Pa. 470. Against conversion of trust funds by trustee. *Lincoln v. Morrison*, 64 Neb. 725, 57 L. R. A. 885; *State v. Edwards*, 61 Neb. 181, 52 L. R. A. 858; *State v. Foster*, 5 Wyo. 199, 63 A. S. R. 47. Against breach of trust by executor or administrator. *Brewster v. Striker*, 2 N. Y. 19; *Gee v. Hicks*, Rich. Eq. Cas. (S. C.) 5.

<sup>495</sup> *Brill v. St. L. Car Co.*, 80 Fed. 909; *American T. & B. Co. v. Boone*, 102 Ga. 202, 66 A. S. R. 167; *Lambert v. Alcorn*, 144 Ill. 313, 330; *John-*

respect, and the burden of proving the unlawful act or intention rests, accordingly, on the party who alleges it.

### § 56. Agency.

Ordinarily, an authority to commit a breach of the law is not presumed, in the absence of evidence on the question.<sup>496</sup> Thus, the court will not indulge a presumption that an agent to procure evidence has authority to bribe witnesses.<sup>497</sup>

### § 57. Contracts.

If an agreement is valid on its face, the burden of showing its illegality is upon the party attacking it.<sup>498</sup> Thus, if an executory contract for the purchase and sale of stocks or commodities does not appear on its face to be a mere gambling transaction, the presumption is that it was made in good

son v. Farwell, 7 Me. 370, 375; Linn v. Chambersburg, 160 Pa. 511, 25 L. R. A. 217.

<sup>496</sup> *Harding v. Greening*, 8 Taunt. 42; *Com. v. Briant*, 142 Mass. 463, 56 A. R. 707; *Farber v. Mo. Pac. R. Co.*, 116 Mo. 81, 20 L. R. A. 350; *Staples v. Schmid*, 18 R. I. 224, 19 L. R. A. 824. See, however, *Rex v. Almon*, 5 Burrows, 2686, 2688; *Rex v. Walter*, 3 Esp. 21.

<sup>497</sup> *The Queen's Case*, 2 Brod. & B. 302, 306; *Green v. Woodbury*, 48 Vt. 5.

<sup>498</sup> *Sissons v. Dixon*, 5 Barn. & C. 758; *U. S. v. Trans-Mo. Freight Ass'n*, 19 U. S. App. 36, 24 L. R. A. 73; *Bayles v. Kan. P. R. Co.*, 13 Colo. 181, 5 L. R. A. 480; *Wehmann v. M., St. P. & S. S. M. R. Co.*, 58 Minn. 22; *Feldman v. Gambler*, 26 N. J. Eq. 494; *Burdine v. Burdine's Ex'r*, 98 Va. 515, 81 A. S. R. 741.

*Usury.* *Abbott v. Stone*, 172 Ill. 634, 64 A. S. R. 60; *Sutphen v. Cushman*, 35 Ill. 186; *Richards v. Purdy*, 90 Iowa, 502, 48 A. S. R. 458.

The presumption is that a contract or conveyance made in a foreign state conforms to the law of that state. *Cutler v. Wright*, 22 N. Y. 472; *Sadler v. Anderson*, 17 Tex. 245. And see *Miller v. Wilson*, 146 Ill. 523, 37 A. S. R. 186; *Wheeler v. Constantine*, 39 Mich. 62, 33 A. R. 355.

Presumption as to foreign marriage, see § 29, *supra*.

faith, with a mutual intention that it should be performed, so that the burden of showing illegality by establishing a contrary intention rests on the party asserting it.<sup>499</sup> If, however, a contract is shown to fall within the general prohibition of a statute, the burden of bringing it within an exception in the act rests on the party claiming under it. Thus, if it appears that the contract upon which the action is brought was made on Sunday, in violation of statute, the burden of showing that it was a work of charity or necessity, and consequently within the exception of the statute, rests on the plaintiff.<sup>500</sup>

It is said that if a contract is susceptible of two constructions, by one of which it is illegal, and by the other legal, the presumption is that the parties intended it in a lawful sense, and it will be given effect accordingly.<sup>501</sup> This so-called presumption is not truly such, being in reality a rule of construction expressed in the indirect form of a presumption;<sup>502</sup> and it will be applied only when the contract is susceptible of two constructions. If the intention of the parties to enter into an illegal contract is clear, the presumption does not arise, and the agreement will accordingly be held to be invalid.<sup>503</sup>

<sup>499</sup> *Ponder v. Jerome Hill Cotton Co.*, 100 Fed. 373; *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199; *Beadles v. McElrath*, 85 Ky. 230; *Jones v. Ames*, 135 Mass. 431; *Mohr v. Miesen*, 47 Minn. 228; *Crawford v. Spencer*, 92 Mo. 498, 1 A. S. R. 745; *Story v. Salomon*, 71 N. Y. 420; *Williams v. Connor*, 14 S. C. 621. For a full treatment of the legality of contract dealings in futures, see *Hammon, Cont.* § 217.

<sup>500</sup> *W. U. Tel. Co. v. Yopst*, 118 Ind. 248, 3 L. R. A. 224; *Sayre v. Wheeler*, 32 Iowa, 559; *Troewert v. Decker*, 51 Wis. 46, 37 A. R. 808.

<sup>501</sup> *Robson v. Crew*, Cro. Eliz. 705; *U. S. v. Cent. Pac. R. Co.*, 118 U. S. 235; *Wyatt v. Larimer & W. Irr. Co.*, 18 Colo. 298, 36 A. S. R. 280; *Crittenden v. French*, 21 Ill. 598; *Hunt v. Elliott*, 80 Ind. 245, 41 A. R. 794; *Guernsey v. Cook*, 120 Mass. 501; *Merrill v. Melchior*, 30 Miss. 516; *Lorillard v. Clyde*, 86 N. Y. 384; *Curtis v. Gokey*, 68 N. Y. 300; *Houlton v. Nichol*, 93 Wis. 393, 57 A. S. R. 928.

<sup>502</sup> *Hammon, Cont.* §§ 395-397.

**§ 58. Marriage.**

(a) **Legality in general.** If a marriage in fact is proved, whether directly or by circumstantial evidence, the presumption is that it is legal.<sup>504</sup> This may be so, even where a prior marriage between one of the parties and a third person is shown. It is often presumed that the former spouse was either dead<sup>505</sup> or divorced<sup>506</sup> at the time of the second marriage.

(b) **Common-law marriage—Cohabitation and repute.** A marriage may be proved by direct evidence, as where a certificate of marriage is produced, or an eye witness testifies to the contract or the ceremony; or it may be established by indirect evidence, as where circumstances are proved from which an inference may be drawn that the parties entered into a marriage contract or ceremony. A common form of indirect or circumstantial evidence of marriage is that which consists of evidence that the parties in question cohabited as man and wife; that they declared or acknowledged themselves as such; that they were generally reputed to be man and wife; and that they were commonly received as such, especially among friends and relatives. These circumstances justify the jury in finding an actual marriage, even though there be no direct evidence of it.<sup>507</sup> The most important of these circum-

<sup>503</sup> *Stadhard v. Lee*, 3 Best & S. 364; *Russell v. Allerton*, 108 N. Y. 288, 292.

<sup>504</sup> Section 29, *supra*.

<sup>505</sup> Section 62(c), *infra*.

<sup>506</sup> Section 35, *supra*.

<sup>507</sup> *Hervey v. Hervey*, 2 W. Bl. 877; *Moore v. Heineke*, 119 Ala. 627; *Costill v. Hill*, 55 N. J. Eq. 479; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *In re Taylor*, 9 Paige (N. Y.) 611; *Fenton v. Reed*, 4 Johns. (N. Y.) 52, 4 A. D. 244; *Jenkins v. Bisbee*, 1 Edw. Ch. (N. Y.) 377 (*semble*); *Eldred v. Eldred*, 97 Va. 606.

Different or additional combinations of circumstances constituting proof of marriage will be found in the following cases:



stances are cohabitation and repute, and, to establish a marriage, both must concur,—neither is sufficient without the other.<sup>508</sup> Indeed, in many jurisdictions, proof of cohabitation

ENGLAND: *Steadman v. Powell*, 1 Addams Ecc. 58 (2 Eng. Ecc. R. 26); *Else v. Else*, Milw. 146.

UNITED STATES: *Arnold v. Chesebrough*, 58 Fed. 833.

ILLINOIS: *Lowry v. Coster*, 91 Ill. 182; *Harman v. Harman*, 16 Ill. 85.

KENTUCKY: *Stover v. Boswell's Heir*, 3 Dana, 232.

LOUISIANA: *Blasini v. Blasini's Succession*, 30 La. Ann. 1388; *Bothick v. Bothick*, 45 La. Ann. 1382; *Hobdy v. Jones*, 2 La. Ann. 944; *Holmes v. Holmes*, 6 La. 463, 26 A. D. 482.

MAINE: *Taylor v. Robinson*, 29 Me. 323.

MARYLAND: *Jackson v. Jackson*, 80 Md. 176; *Redgrave v. Redgrave*, 38 Md. 93; *Sellman v. Bowen*, 8 Gill & J. 50, 29 A. D. 524; *Barnum v. Barnum*, 42 Md. 251, 296.

MINNESOTA: *State v. Worthingham*, 23 Minn. 528.

MISSOURI: *Cargile v. Wood*, 63 Mo. 501.

MONTANA: *Soyer v. Great Falls Water Co.*, 15 Mont. 1.

NEBRASKA: *Olson v. Peterson*, 33 Neb. 358.

NEW HAMPSHIRE: *Stevens v. Reed*, 37 N. H. 49.

NEW JERSEY: *Wallace's Case*, 49 N. J. Eq. 530.

NORTH CAROLINA: *Jones v. Reddick*, 79 N. C. 290; *Doe d. Archer v. Haithcock*, 51 N. C. (6 Jones) 421.

OREGON: *McBean v. McBean*, 37 Or. 195.

PENNSYLVANIA: *Durning v. Hastings*, 183 Pa. 210.

TENNESSEE: *Moore v. Moore*, 102 Tenn. 148, 152.

TEXAS: *Wright v. Wright*, 6 Tex. 3.

VIRGINIA: *Purcell v. Purcell*, 4 Hen. & M. 507.

WEST VIRGINIA: *Hitchcox v. Hitchcox*, 2 W. Va. 435.

<sup>508</sup> *Arnold v. Chesebrough*, 58 Fed. 833. *Contra*, *Jenkins v. Bisbee*, 1 Edw. Ch. (N. Y.) 377 (semble); *Fornshill v. Murray*, 1 Bland Ch. (Md.) 479, 18 A. D. 344 (semble); *Pettingill v. McGregor*, 12 N. H. 179, 184 (semble).

Cohabitation alone is not sufficient. *Cargile v. Wood*, 63 Mo. 501; *Com. v. Stump*, 53 Pa. 132, 91 A. D. 198; *Williams v. Herrick*, 21 R. I. 401, 79 A. S. R. 809; *Odd Fellows' Ben. Ass'n v. Carpenter*, 17 R. I. 720; *Eldred v. Eldred*, 97 Va. 606. See, however, *State v. Schweitzer*, 57 Conn. 532, 6 L. R. A. 125; *Port v. Port*, 70 Ill. 484; *Dannell v. Dannell's Adm'r*, 4 Bush (Ky.) 51; *Copes v. Pearce*, 7 Gill (Md.) 247; *Cheseldine's Lessee v. Brewer*, 1 Har. & McH. (Md.) 152; *Henderson v. Cargill*, 31 Miss. 367, 419; *Allen v. Hall*, 2 Nott & McC. (S. C.) 114,

and reputation alone justifies a finding of marriage, so that proof of other circumstances tending to establish the relation is not necessary.<sup>509</sup>

— **Nature of presumption—Rebuttal.** The conclusion of marriage thus based on circumstantial evidence is commonly termed a presumption.<sup>510</sup> In some cases it is spoken of as

10 A. D. 578. The cohabitation must be continuous. *McKenna v. McKenna*, 180 Ill. 577; *Yardley's Estate*, 75 Pa. 207; *Senser v. Bower*, 1 Pen. & W. (Pa.) 450; *Eldred v. Eldred*, 97 Va. 606.

Repute alone is not sufficient. *Greenawalt v. McEnelley*, 85 Pa. 352, 356. See, however, *Doe d. Fleming v. Fleming*, 4 Bing. 266. The repute must be of a general and uniform character. Special repute, based on divided or singular opinion, is not sufficient. *Cunningham v. Cunningham*, 2 Dow, 482; *Arnold v. Chesebrough*, 58 Fed. 833; *White v. White*, 82 Cal. 427, 7 L. R. A. 799, 804; *McKenna v. McKenna*, 180 Ill. 577, 591; *Barnum v. Barnum*, 42 Md. 251, 297; *Jackson v. Jackson*, 82 Md. 17, 33; *Wallace's Case*, 49 N. J. Eq. 530; *Greenawalt v. McEnelley*, 85 Pa. 352; *Yardley's Estate*, 75 Pa. 207; *Williams v. Herrick*, 21 R. I. 401, 79 A. S. R. 809; *Eldred v. Eldred*, 97 Va. 606. And see *Jones v. Hunter*, 2 La. Ann. 254. See, however, *Lyle v. Ellwood*, L. R. 19 Eq. 98; *Badger v. Badger*, 88 N. Y. 546, 42 A. R. 263.

<sup>509</sup> *De Thoren v. Attorney General*, 1 App. Cas. 686; *Campbell v. Campbell*, L. R. 1 H. L. Sc. 182; *George v. Thomas*, 10 U. C. Q. B. 604; *Doe d. Breakey v. Breakey*, 2 U. C. Q. B. 349; *In re Ruffino's Estate*, 116 Cal. 304; *Hammick v. Bronson*, 5 Day (Conn.) 290; *Trimble v. Trimble*, 2 Ind. 76; *Fleming v. Fleming*, 8 Blackf. (Ind.) 234; *Bowers v. Van Winkle*, 41 Ind. 432; *Crozier v. Gano*, 1 Bibb (Ky.) 257; *Hoffman v. Simpson*, 110 Mich. 133; *Boatman v. Curry*, 25 Mo. 433; *Young v. Foster*, 14 N. H. 114; *Jenkins v. Bisbee*, 1 Edw. Ch. (N. Y.) 377 (semble); *Senser v. Bower*, 1 Pen. & W. (Pa.) 450; *Odd Fellows' Ben. Ass'n v. Carpenter*, 17 R. I. 720, 722; *Northfield v. Vershire*, 33 Vt. 110. And see *Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 A. D. 406; *Long, Dom. Rel.* 101.

<sup>510</sup> ENGLAND: *Campbell v. Campbell*, L. R. 1 H. L. Sc. 182; *Cunningham v. Cunningham*, 2 Dow, 482.

UNITED STATES: *Arnold v. Chesebrough*, 58 Fed. 833.

CALIFORNIA: *In re Ruffino's Estate*, 116 Cal. 304.

CONNECTICUT: *State v. Schweitzer*, 57 Conn. 532, 6 L. R. A. 125.

ILLINOIS: *Cartwright v. McGown*, 121 Ill. 388, 2 A. S. R. 105.

KENTUCKY: *Donnelly v. Donnelly's Heirs*, 8 B. Mon. 113.

LOUISIANA: *Holmes v. Holmes*, 6 La. 463, 26 A. D. 482.

a presumption of fact; that is, an inference which the jury may draw or decline to draw, as to them seems proper. Its effect is merely to justify a finding of marriage, not to compel such a finding.<sup>511</sup> In other cases the presumption is regarded as one of law; that is, it is not an inference at all, but a rule of law by which the court assumes the existence of the marriage, without regard to what the jury may think about it. Its effect in this view is to make a *prima facie* case of marriage, and thus to cast on the party disputing the fact the burden of adducing evidence to the contrary.<sup>512</sup> In all cases, however, the presumption is rebuttable. Cohabitation and repute do not constitute marriage; they are merely evidence of it; and the party denying the union may accordingly introduce evi-

MARYLAND: *Barnum v. Barnum*, 42 Md. 251, 296; *Copes v. Pearce*, 7 Gill, 247.

MINNESOTA: *State v. Worthingham*, 23 Minn. 528.

NEW JERSEY: *Voorhees v. Voorhees*, 46 N. J. Eq. 411, 19 A. S. R. 404.

NEW YORK: *Gall v. Gall*, 114 N. Y. 109; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Clayton v. Wardell*, 4 N. Y. 230; *Hynes v. McDermott*, 91 N. Y. 451, 43 A. R. 677; *Brinkley v. Brinkley*, 50 N. Y. 184, 10 A. R. 460; *Jenkins v. Bisbee*, 1 Edw. Ch. 377.

OREGON: *McBean v. McBean*, 37 Or. 195.

PENNSYLVANIA: *Vincent's Appeal*, 60 Pa. 228; *Com. v. Stump*, 53 Pa. 132, 91 A. D. 198; *Greenawalt v. McEnelley*, 85 Pa. 352.

RHODE ISLAND: *Williams v. Herrick*, 21 R. I. 401, 79 A. S. R. 809.

Presumption of regularity of ceremonial marriage, see § 29, *supra*.

<sup>511</sup> *Doe d. Breakey v. Breakey*, 2 U. C. Q. B. 349; *Redgrave v. Redgrave*, 38 Md. 93, 97; *Cargile v. Wood*, 63 Mo. 501; *Fenton v. Reed*, 4 Johns. (N. Y.) 52, 4 A. D. 244; *Eldred v. Eldred*, 97 Va. 606.

<sup>512</sup> *De Thoren v. Attorney General*, 1 App. Cas. 686; *George v. Thomas*, 10 U. C. Q. B. 604; *Moore v. Heineke*, 119 Ala. 627, 636; *Dannell v. Dannell's Adm'r*, 4 Bush (Ky.) 51 (*semble*); *Hobdy v. Jones*, 2 La. Ann. 944; *Blasini v. Blasini's Succession*, 30 La. Ann. 1388; *Bothick v. Bothick*, 45 La. Ann. 1382, 1384; *Hoffman v. Simpson*, 110 Mich. 133; *Henderson v. Cargill*, 31 Miss. 367, 419; *Soyer v. Great Falls*

dence in support of his contention.<sup>513</sup> To dispel the presumption, the evidence adduced in rebuttal must be cogent and satisfactory,<sup>514</sup> especially after the lapse of a long time, during which the cohabitation and repute have continued.<sup>515</sup>

— **Matrimonial intent.** To justify a presumption of marriage, the cohabitation must, in its origin, have been consistent with a matrimonial intent.<sup>516</sup> Thus, if the cohabitation originated in fornication, a presumption of marriage does not arise. On the contrary, it is presumed that the association thus begun in violation of law continued so.<sup>517</sup> This presumption of con-

Water Co., 15 Mont. 1; Young v. Foster, 14 N. H. 114; Wallace's Case, 49 N. J. Eq. 530, 535 (semble); Costill v. Hill, 55 N. J. Eq. 479; Allen v. Hall, 2 Nott & McC. (S. C.) 114, 10 A. D. 578.

<sup>513</sup> Laurence v. Laurence, 164 Ill. 367, 374; Myatt v. Myatt, 44 Ill. 473; Sneed v. Ewing, 5 J. J. Marsh. (Ky.) 460, 22 A. D. 41; Boone v. Purnell, 28 Md. 607, 92 A. D. 713; Stevenson's Heirs v. McReary, 12 Smedes & M. (Miss.) 9, 51 A. D. 102; Adair v. Mette, 156 Mo. 496; Olson v. Peterson, 33 Neb. 358, 363; Emerson v. Shaw, 56 N. H. 418; Costill v. Hill, 55 N. J. Eq. 479; Wallace's Case, 49 N. J. Eq. 530; Grimm's Estate, 131 Pa. 199, 17 A. S. R. 796; Reading F. I. & T. Co.'s Appeal, 113 Pa. 204, 57 A. R. 448; Hunt's Appeal, 86 Pa. 294; Allen v. Hall, 2 Nott & McC. (S. C.) 114, 10 A. D. 578; Eldred v. Eldred, 97 Va. 606. And see Collins v. Voorhees, 47 N. J. Eq. 555.

<sup>514</sup> Hynes v. McDermott, 91 N. Y. 451, 43 A. R. 677; Eldred v. Eldred, 97 Va. 606.

<sup>515</sup> Doe d. Breakey v. Breakey, 2 U. C. Q. B. 349, 354; Hiler v. People, 156 Ill. 511, 47 A. S. R. 221, 227.

<sup>516</sup> Williams v. Herrick, 21 R. I. 401, 79 A. S. R. 809; Stans v. Baitey, 9 Wash. 115, 118; Long, Dom. Rel. 103.

<sup>517</sup> ENGLAND: Cunningham v. Cunningham, 2 Dow, 482.

UNITED STATES: Arnold v. Chesebrough, 58 Fed. 833.

CALIFORNIA: White v. White, 82 Cal. 427, 7 L. R. A. 799.

MARYLAND: Jackson v. Jackson, 80 Md. 176, 152; Jones v. Jones, 45 Md. 144; Barnum v. Barnum, 42 Md. 251, 297.

MICHIGAN: Van Dusan v. Van Dusan, 97 Mich. 70.

MINNESOTA: In re Terry's Estate, 58 Minn. 268.

MISSISSIPPI: Floyd v. Calvert, 53 Miss. 37.

MISSOURI: Cargile v. Wood, 63 Mo. 501.

NEW YORK: Clayton v. Wardell, 4 N. Y. 230; Badger v. Badger, 88 N. Y. 546, 42 A. R. 263 (semble); Brinkley v. Brinkley, 50 N. Y. 184,

tinuity is rebuttable, however; and evidence of a subsequent intention to enter into the marriage relation is admissible, whether it be direct or circumstantial.<sup>518</sup>

So if, when the cohabitation commenced, either of the parties was already married to a third person still living and undivorced, and this fact was known to either, the cohabitation cannot give rise to a presumption of marriage.<sup>519</sup> A presumption of marriage may arise after the death or divorce of the other party to the prior legal marriage, however. Ordinarily, to found this presumption, there must be evidence that, after the removal of the disability, the parties to the cohabitation acted on an intent presently to enter into the marriage relation. Mere cohabitation and repute as man and wife subsequent to the death or divorce of the previous spouse is not sufficient, since the meretricious character of the relation is presumed to continue.<sup>520</sup> This presumption of continuity also is rebuttable;

10 A. R. 460, 470 (semble); *Hynes v. McDermott*, 91 N. Y. 451, 43 A. R. 677; *Gall v. Gall*, 114 N. Y. 109.

OREGON: *McBean v. McBean*, 37 Or. 195.

PENNSYLVANIA: *Reading F. I. & T. Co.'s Appeal*, 113 Pa. 204, 57 A. R. 448; *Grimm's Estate*, 131 Pa. 199, 17 A. S. R. 796.

VIRGINIA: *Eldred v. Eldred*, 97 Va. 606.

If a person cohabits with two persons of the opposite sex during the same period of time, a presumption of marriage cannot arise in reference to either person. *Cartwright v. McGown*, 121 Ill. 388, 2 A. S. R. 105, 116 (semble).

<sup>518</sup> *White v. White*, 82 Cal. 427, 7 L. R. A. 799; *Jackson v. Jackson*, 80 Md. 176, 192; *Jones v. Jones*, 45 Md. 144, 156; *In re Terry's Estate*, 58 Minn. 268 (semble); *Gall v. Gall*, 114 N. Y. 109; *Badger v. Badger*, 88 N. Y. 546, 42 A. R. 263; *Hynes v. McDermott*, 91 N. Y. 451, 43 A. R. 677; *Long, Dom. Rel.* 104.

<sup>519</sup> *Wright v. Skinner*, 17 U. C. C. P. 317; *Gall v. Gall*, 114 N. Y. 109; *Moore v. Moore*, 102 Tenn. 148.

A marriage being shown, the presumption is ordinarily that no impediment to the union existed, and that the parties accordingly had legal capacity to marry. Section 29, *supra*.

<sup>520</sup> *Lapsley v. Grierson*, 1 H. L. Cas. 498; *Cartwright v. McGown*, 121

and the subsequent intent to assume the marital relation may be shown by circumstances as well as by direct evidence.<sup>521</sup> Nor does the presumption of continuity of the meretricious character of the relation apply where neither party, at the time they assumed the marriage relation, knew of any impediment to the union. If two persons enter into marriage, honestly believing, on reasonable though mistaken grounds, that they are under no disability to do so, and they continue to cohabit as man and wife after the impediment to their marriage is removed, and are reputed as such, a marriage may be presumed from such cohabitation and reputation alone. Further evidence of a renewed intention on their part to assume the marriage relation is not required.<sup>522</sup>

— Subsequent marriage of party to common-law marriage.

Ill. 388, 2 A. S. R. 105; *Randlett v. Rice*, 141 Mass. 385; *Rose v. Rose*, 67 Mich. 619; *State v. Worthingham*, 23 Minn. 528, 536; *Voorhees v. Voorhees' Ex'rs*, 46 N. J. Eq. 411, 19 A. S. R. 404; *Collins v. Voorhees*, 47 N. J. Eq. 315, 555, 24 A. S. R. 412; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Collins v. Collins*, 80 N. Y. 1; *Hunt's Appeal*, 86 Pa. 294; *Williams v. Williams*, 46 Wis. 464, 32 A. R. 722; *Spencer v. Pollock*, 83 Wis. 215. And see *State v. Whaley*, 10 Rich. (S. C.) 500.

<sup>521</sup> *Campbell v. Campbell*, L. R. 1 H. L. Sc. 182; *Blanchard v. Lambert*, 43 Iowa, 228, 22 A. R. 245; *Donnelly v. Donnelly's Heirs*, 8 B. Mon. (Ky.) 113; *Taylor v. Swett*, 3 La. 33, 22 A. D. 156 (semble); *Williams v. Kilburn*, 88 Mich. 279; *State v. Worthingham*, 23 Minn. 528; *Fenton v. Reed*, 4 Johns. (N. Y.) 52, 4 A. D. 244; *Rose v. Clark*, 8 Paige (N. Y.) 574; *Yates v. Houston*, 3 Tex. 433; *Williams v. Williams*, 46 Wis. 464, 32 A. R. 722, 730 (semble). And see *Northfield v. Plymouth*, 20 Vt. 582.

It is relevant to this question of intention to show whether, at the time of commencing their illicit relation, the parties knew of the impediment to their marriage, and whether, after the impediment was removed, they knew of that fact. *Cartwright v. McGown*, 121 Ill. 388, 2 A. S. R. 105; *Randlett v. Rice*, 141 Mass. 385; *O'Gara v. Eisenlohr*, 38 N. Y. 296.

<sup>522</sup> *De Thoren v. Attorney General*, 1 App. Cas. 686; *Poole v. People*, 24 Colo. 510, 65 A. S. R. 245; *Cartwright v. McGown*, 121 Ill. 388, 2 A. S. R. 105, 114 (semble); *Teter v. Teter*, 101 Ind. 129, 51 A. R. 742; *Long, Dom. Rel.* 104.

Hammon, Ev.—16.

The presumption of marriage arising from cohabitation and repute is dispelled by the fact that one of the parties subsequently entered into a formal marriage with a third person in the lifetime of the other.<sup>523</sup> When this additional fact of subsequent marriage is shown, the question of the earlier marriage by cohabitation becomes one for the jury upon all the evidence, regardless of any presumption.<sup>524</sup>

— **Legitimacy—Succession—Divorce—Criminal cases.** Important applications of the presumption of marriage occur in cases where the legitimacy of the offspring of the cohabitation or of a subsequent marriage is in issue;<sup>525</sup> in cases where one

<sup>523</sup> *Moore v. Heineke*, 119 Ala. 627; *Case v. Case*, 17 Cal. 598; *Jenkins v. Jenkins*, 83 Ga. 283, 20 A. S. R. 316; *Jones v. Jones*, 48 Md. 391, 30 A. R. 466; *Clayton v. Wardell*, 4 N. Y. 230. And see *Taylor v. Taylor*, 1 Lee Ecc. 571; *Myatt v. Myatt*, 44 Ill. 473.

The subsequent ceremonial marriage is a circumstance of little weight, however, if the party entering into it supposed that her former husband by cohabitation was dead. *Thompson v. Nims*, 83 Wis. 261.

The prior marriage may be established by circumstantial evidence, however. *Moore v. Heineke*, 119 Ala. 627; *Jenkins v. Jenkins*, 83 Ga. 283, 20 A. S. R. 316; *Donnelly v. Donnelly's Heirs*, 8 B. Mon. (Ky.) 113; *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460, 22 A. D. 41; *Camden v. Belgrade*, 75 Me. 126, 46 A. R. 364; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Doe d. Archer v. Haithcock*, 51 N. C. (6 Jones) 421; *Poultney v. Fairhaven*, Brayt. (Vt.) 185. And see *Applegate v. Applegate*, 45 N. J. Eq. 116; *Northfield v. Plymouth*, 20 Vt. 582. *Contra*, *Jones v. Jones*, 48 Md. 391, 30 A. R. 466; *Case v. Case*, 17 Cal. 598.

<sup>524</sup> *Moore v. Heineke*, 119 Ala. 627; *Jenkins v. Jenkins*, 83 Ga. 283, 20 A. S. R. 316; *Camden v. Belgrade*, 75 Me. 126, 46 A. R. 364 (semble); *Senser v. Bower*, 1 Pen. & W. (Pa.) 450; *Long*, Dom. Rel. 104.

<sup>525</sup> *Campbell v. Campbell*, L. R. 1 H. L. Sc. 182; *Doe d. Breakey v. Breakey*, 2 U. C. Q. B. 349; *In re Ruffino's Estate*, 116 Cal. 304; *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460, 22 A. D. 41; *Donnelly v. Donnelly's Heirs*, 8 B. Mon. (Ky.) 113; *Bothick v. Bothick*, 45 La. Ann. 1382; *Barnum v. Barnum*, 42 Md. 251, 296; *Hoffman v. Simpson*, 110 Mich. 133; *State v. Worthingham*, 23 Minn. 528; *Henderson v. Cargill*, 31 Miss. 367; *Hynes v. McDermott*, 91 N. Y. 451, 43 A. R. 677; *Senser v. Bower*, 1 Pen. & W. (Pa.) 450.

of the parties to the cohabitation has died, and the other asserts marital rights in the decedent's property;<sup>526</sup> and in actions for divorce between the parties.<sup>527</sup> The application of the presumption of marriage arising from cohabitation and repute presents a conflict of opinion in criminal cases. In some, the presumption is applied here as well as in civil trials.<sup>528</sup> In

<sup>526</sup> *Blanchard v. Lambert*, 43 Iowa, 228, 22 A. R. 245; *Fleming v. Fleming*, 8 Blackf. (Ind.) 234; *Donnelly v. Donnelly's Heirs*, 8 B. Mon. (Ky.) 113; *Redgrave v. Redgrave*, 38 Md. 93; *Young v. Foster*, 14 N. H. 114; *Costill v. Hill*, 55 N. J. Eq. 479; *Betsinger v. Chapman*, 88 N. Y. 487; *Gall v. Gall*, 114 N. Y. 109; *Rose v. Clark*, 8 Paige (N. Y.) 574; *Fenton v. Reed*, 4 Johns. (N. Y.) 52, 4 A. D. 244; *Badger v. Badger*, 88 N. Y. 546, 42 A. R. 263; *Richard v. Brehm*, 73 Pa. 140, 13 A. R. 733.

<sup>527</sup> *Abandonment*. *Brinkley v. Brinkley*, 50 N. Y. 184, 10 A. R. 460, 470 (semble).

*Adultery*. *Morris v. Morris*, 20 Ala. 168; *White v. White*, 82 Cal. 427, 7 L. R. A. 799. See, however, *Case v. Case*, 17 Cal. 598; *Trimble v. Trimble*, 2 Ind. 76, 78. Presumption of marriage in prosecution for adultery, see note 529, *infra*.

*Cruelty*. *Burns v. Burns*, 13 Fla. 369; *Harman v. Harman*, 16 Ill. 85; *Wright v. Wright*, 6 Tex. 3. And see *Hitchcox v. Hitchcox*, 2 W. Va. 435.

*Desertion*. *Purcell v. Purcell*, 4 Hen. & M. (Va.) 507 (semble).

In Ohio, the prior marriage of one of the spouses cannot, it seems, be shown by cohabitation and reputation, in an action against him by the subsequent wife for divorce on that ground. *Houpt v. Houpt*, 5 Ohio, 539.

<sup>528</sup> *Bastardy*. *State v. Worthingham*, 23 Minn. 528; *Olson v. Peterson*, 33 Neb. 358, 363 (semble).

*Nonsupport*. *Poole v. People*, 24 Colo. 510, 65 A. S. R. 245; *State v. Schweitzer*, 57 Conn. 532, 6 L. R. A. 125.

*Wife beating*. *Hanon v. State*, 63 Md. 123.

Admissions, declarations, and confessions of marriage are admissible in criminal cases of this sort. *Reg. v. Simmonsto*, 1 Car. & K. 164; *Miles v. U. S.*, 103 U. S. 304; *Cameron v. State*, 14 Ala. 546, 48 A. D. 111; *Buchanan v. State*, 55 Ala. 154; *Williams v. State*, 54 Ala. 131, 25 A. R. 665; *Parker v. State*, 77 Ala. 47, 54 A. R. 43; *State v. Schweitzer*, 57 Conn. 532, 6 L. R. A. 125; *Cook v. State*, 11 Ga. 53, 56 A. D. 410; *Squire v. State*, 46 Ind. 459; *Ham's Case*, 11 Me. 391; *State v. Hodgkins*, 19 Me. 155, 36 A. D. 742 (semble); *Com. v. Holt*, 121 Mass. 61



others a contrary view is taken, and a ceremonial marriage must be proved.<sup>529</sup>

(statute); *Clayton v. Wardell*, 4 N. Y. 230, 234 (semble); *Wolverton v. State*, 16 Ohio, 173, 47 A. D. 373; *Finney v. State*, 3 Head (Tenn.) 544 (statute). And see *Forney v. Hallacher*, 8 Serg. & R. (Pa.) 159, 11 A. D. 590. *Contra*, *State v. Roswell*, 6 Conn. 446; *State v. Johnson*, 12 Minn. 476, 93 A. D. 241; *People v. Humphrey*, 7 Johns. (N. Y.) 314.

<sup>529</sup> *Adultery*. *Burns v. Burns*, 13 Fla. 369 (semble); *State v. Hodgkins*, 19 Me. 155, 36 A. D. 742.

*Bigamy*. *Doe d. Breakey v. Breakey*, 2 U. C. Q. B. 349, 353 (semble); *Brown v. State*, 52 Ala. 338; *People v. Beevers*, 99 Cal. 286, 289 (semble); *Hammick v. Bronson*, 5 Day (Conn.) 290, 293 (semble); *Green v. State*, 21 Fla. 403, 58 A. R. 670; *Hiler v. People*, 156 Ill. 511, 47 A. S. R. 221; *Stover v. Boswell's Heir*, 3 Dana (Ky.) 232, 233 (semble); *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460, 22 A. D. 41, 69 (semble); *Redgrave v. Redgrave*, 38 Md. 93, 97 (semble); *Jackson v. Jackson*, 80 Md. 176, 187 (semble); *State v. Johnson*, 12 Minn. 476, 93 A. D. 241; *Applegate v. Applegate*, 45 N. J. Eq. 116, 119 (semble); *Fenton v. Reed*, 4 Johns. (N. Y.) 52, 4 A. D. 244 (semble); *Clayton v. Wardell*, 4 N. Y. 230, 234 (dubitante); *Hayes v. People*, 25 N. Y. 390, 82 A. D. 364. And see *Case v. Case*, 17 Cal. 598.

However, in a prosecution for bigamy, the prior marriage of the accused may be proved by cohabitation and repute, coupled with his declarations or admissions of marriage. *Moore v. Heineke*, 119 Ala. 627, 637 (semble); *Langtry v. State*, 30 Ala. 536; *Halbrook v. State*, 34 Ark. 511, 36 A. R. 17; *People v. Beevers*, 99 Cal. 286, 289 (semble); *State v. Hughes*, 35 Kan. 626, 57 A. R. 195; *Com. v. Jackson*, 11 Bush (Ky.) 679, 21 A. R. 225; *State v. Britton*, 4 McCord (S. C.) 256; *State v. Hilton*, 3 Rich. Law (S. C.) 434, 45 A. D. 783; *Dumas v. State*, 14 Tex. App. 464, 46 A. R. 241; *Oneale v. Com.*, 17 Grat. (Va.) 582. *Contra*, *Sellman v. Bowen*, 8 Gill & J. (Md.) 50, 29 A. D. 524' (semble); *Fornshill v. Murray*, 1 Bland Ch. (Md.) 479, 18 A. D. 344 (semble); *People v. Lambert*, 5 Mich. 349, 72 A. D. 49.

*Incest*. *State v. Roswell*, 6 Conn. 446.

*Lascivious cohabitation*. *Com. v. Littlejohn*, 15 Mass. 163 (semble).

*Seduction*. *West v. State*, 1 Wis. 209.

The same rule is applied in actions for criminal conversation. *Morris v. Miller*, 4 Burrow, 2057, 1 W. Bl. 632; *Catherwood v. Caslon*, 13 Mees. & W. 261, 265; *Hammick v. Bronson*, 5 Day (Conn.) 290, 293 (semble); *Burns v. Burns*, 13 Fla. 369 (semble); *Bowers v. Van Winkle*, 41 Ind. 432 (semble); *Fleming v. Fleming*, 8 Blackf. (Ind.) 234,

## N. LEGITIMACY.

## § 59. General rules.

The present discussion concerns the legitimacy of children born in wedlock, fatherhood being in question. Legitimacy depending on the fact and validity of marriage, fatherhood being certain, is considered in other connections.<sup>530</sup>

In the absence of evidence of impotency or lack of opportunity, sexual intercourse between husband and wife is presumed.<sup>531</sup> If, therefore, a child is born in wedlock, the presumption is that it is legitimate, and the burden of adducing evidence to the contrary is on the party who denies legitimacy;<sup>532</sup> and this is true where the child is born so soon after

235 (semble); *Stover v. Boswell's Heir*, 3 Dana (Ky.) 232, 233 (semble); *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460, 22 A. D. 41, 69 (semble); *Sellman v. Bowen*, 8 Gill & J. (Md.) 50, 29 A. D. 524 (semble); *Redgrave v. Redgrave*, 38 Md. 93, 97 (semble); *Jackson v. Jackson*, 80 Md. 176, 187 (semble); *Fornshill v. Murray*, 1 Bland Ch. (Md.) 479, 18 A. D. 344 (semble); *Hutchins v. Kimmell*, 31 Mich. 126, 18 A. R. 164 (semble); *Pettingill v. McGregor*, 12 N. H. 179, 184 (semble); *Applegate v. Applegate*, 45 N. J. Eq. 116, 119 (semble); *Fenton v. Reed*, 4 Johns. (N. Y.) 52, 4 A. D. 244 (semble); *Jones v. Reddick*, 79 N. C. 290, 292 (semble); *Doe d. Archer v. Haithcock*, 51 N. C. (6 Jones) 421 (semble). See, however, *Forney v. Hallacher*, 8 Serg. & R. (Pa.) 159, 11 A. D. 590.

It is otherwise in an action for alienation of a wife's affections, however. *Durning v. Hastings*, 183 Pa. 210.

<sup>530</sup> Presumption of the fact of marriage from cohabitation and repute, see § 58, *supra*. See, also, note 535, *infra*. Presumption of regularity of marriage in fact, see § 29, *supra*.

<sup>531</sup> *Morris v. Davis*, 5 Clark & F. 163, 243; *Egbert v. Greenwalt*, 44 Mich. 245, 38 A. R. 260; *Cross v. Cross*, 3 Paige, 139, 23 A. D. 778; *State v. Herman*, 35 N. C. (13 Ired.) 502 (semble).

<sup>532</sup> *Banbury Peerage Case*, 1 Sim. & S. 153, Thayer, Cas. Ev. 45; *Plowes v. Bossey*, 31 Law J. Ch. 681; *Patterson v. Gaines*, 6 How. (U. S.) 550; *Eloi v. Mader*, 1 Rob. (La.) 581, 38 A. D. 192; *Phillips v. Allen*, 2 Allen (Mass.) 453; *Herring v. Goodson*, 43 Miss. 392; *Gurvin v. Cromartie*, 33 N. C. (11 Ired.) 174, 53 A. D. 406; *Scott v. Hillenberg*, 35 Va. 245; *Long, Dom. Rel.* 305.

divorce or the husband's death that it may have been begotten during wedlock;<sup>533</sup> and even where it is born so soon after marriage that it must have been begotten before that event.<sup>534</sup>

Since the presumption under discussion concerns only children born in wedlock, it follows that it can arise only where there has been a lawful marriage,<sup>535</sup> and, moreover, only where

<sup>533</sup> *Alsop v. Bowtrell*, Cro. Jac. 541; *Legge v. Edmonds*, 25 Law J. Ch. 125; *Drennan v. Douglas*, 102 Ill. 341, 40 A. R. 595.

If a child is begotten in wedlock, and before it is born the husband secures a divorce, and the wife marries again, the presumption is that the first husband is the father. *Shuman v. Shuman*, 83 Wis. 250. See, however, *Zachmann v. Zachmann*, 201 Ill. 380, 94 A. S. R. 180.

<sup>534</sup> *Gardner v. Gardner*, 2 App. Cas. 723; *Zachmann v. Zachmann*, 201 Ill. 380, 94 A. S. R. 180; *Tioga County v. South Creek Tp.*, 75 Pa. 433; *McCulloch v. McCulloch*, 69 Tex. 682, 5 A. S. R. 96. See, however, *Shuman v. Shuman*, 83 Wis. 250.

The presumption applies under these circumstances where heirship is in question. *Stegall v. Stegall's Adm'r*, 2 Brock. 256, Fed. Cas. No. 13,351; *Wright v. Hicks*, 12 Ga. 155, 56 A. D. 451, 15 Ga. 160, 60 A. D. 687; *Dennison v. Page*, 29 Pa. 420, 72 A. D. 644; *Kleinert v. Ehlers*, 38 Pa. 439; *Wilson v. Babb*, 18 S. C. 59. It applies also in cases of adulterine bastardy. *State v. Romaine*, 58 Iowa, 46; *State v. Herman*, 35 N. C. (13 Ired.) 502. But it will not be indulged against the husband, so as to defeat his right to annul the marriage for fraud, or so as to relieve the putative father in bastardy proceedings, unless the woman was visibly pregnant at the time of her marriage. *Baker v. Baker*, 13 Cal. 88; *Roth v. Jacobs*, 21 Ohio St. 646. It is otherwise, however, at least in bastardy cases, if she was visibly pregnant at that time. *State v. Shoemaker*, 62 Iowa, 343, 49 A. R. 146; *State v. Herman*, 35 N. C. (13 Ired.) 502; *Miller v. Anderson*, 43 Ohio St. 473, 54 A. R. 823.

The presumption of legitimacy does not apply in favor of an antenuptial child. *Janes' Estate*, 147 Pa. 527.

<sup>535</sup> However, every child is presumed to have been born in lawful wedlock, in the absence of clear and convincing evidence to the contrary. To establish his legitimacy, therefore, neither he nor those claiming under him need show in the first instance that his parents were married. *Weatherford v. Weatherford*, 20 Ala. 548, 56 A. D. 206 (semble); *Orthwein v. Thomas*, 127 Ill. 554, 11 A. S. R. 159; *Strode v. Magowan's Heirs*, 2 Bush (Ky.) 621; *In re Matthews' Estate*, 153 N. Y. 443; *Obenstein's Appeal*, 163 Pa. 14, 25 L. R. A. 477; *Dinkins v.*

that marriage continues in full force and effect. It does not arise, therefore, where the child in question was begotten after the rendition of a decree of divorce from bed and board;<sup>556</sup> much less after a decree a vinculo matrimonii. The fact that there has been a voluntary separation of the parties does not bring the case within this rule, however, and, accordingly, the presumption prevails in such cases unless nonaccess or impotency on the part of the husband is shown.<sup>557</sup>

**§ 60. Rebuttal of presumption.**

The presumption of legitimacy is rebuttable.<sup>558</sup> If it is shown that the husband was impotent, the presumption is dispelled, and illegitimacy is conclusively established; and this was the early rule, as well as the modern opinion.<sup>559</sup> Save in the re-

Samuel, 10 Rich. Law (S. C.) 66; *Ex parte Eason*, 37 S. C. 19. And see *Ill. L. & L. Co. v. Bonner*, 75 Ill. 315; *Vaughan v. Rhodes*, 2 McCord (S. C.) 227, 13 A. D. 713.

<sup>556</sup> *Inter the Parishes of St. George & St. Margaret*, 1 Salk. 123. *Contra*, *McNeely v. McNeely*, 47 La. Ann. 1321.

Nonaccess is not presumed from the mere pendency of an action for divorce, however. *Drennan v. Douglas*, 102 Ill. 341, 40 A. R. 595.

<sup>557</sup> *Inter the Parishes of St. George & St. Margaret*, 1 Salk. 123; *Tate v. Penne*, 7 Mart. (N. S.; La.) 548; *Hemmenway v. Towner*, 1 Allen (Mass.) 209 (semble). See, also, page 250, *infra*.

<sup>558</sup> The presumption is a conclusive one, so called, in certain cases of adulterine bastardy. *State v. Shoemaker*, 62 Iowa, 343, 49 A. R. 146; *State v. Herman*, 35 N. C. (13 Ired.) 502; *Miller v. Anderson*, 48 Ohio St. 473, 54 A. R. 823; *Haworth v. Gill*, 30 Ohio St. 627; *Long, Dom. Rel.* 304.

In Louisiana, no one but the husband or his heirs may disprove the presumption. Neither the wife nor her heirs nor the child may deny legitimacy. *Eloi v. Mader*, 1 Rob. (La.) 581, 38 A. D. 192.

In California it is provided by statute that the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate. *Mills' Estate*, 137 Cal. 298, 92 A. S. R. 175.

<sup>559</sup> *Rex v. Luffe*, 8 East, 193, 205; *Hargrave v. Hargrave*, 9 Beav. 552; *Legge v. Edmonds*, 25 Law J. Ch. 125; *Goss v. Froman*, 89 Ky. 318, 8 L. R. A. 102; *State v. McDowell*, 101 N. C. 734, 736.

Potency of a mature male is presumed. *Gardner v. State*, 81 Ga. 144.

spect of impotency, the presumption was conclusive at common law, unless the husband was beyond the four seas when the child was begotten, and during the entire period of gestation, and evidence to the contrary would not be received, even though its import was to show beyond a doubt that the child was not the husband's.<sup>540</sup> This is no longer the law, however, and, accordingly, any evidence which fairly tends to show illegitimacy is admissible to rebut the presumption.

This evidence in rebuttal usually takes the form of proof of nonaccess of the husband to the wife at the time when the child was begotten, meaning, by access, actual sexual intercourse;<sup>541</sup> and nonaccess in fact may be inferred, even though there was

<sup>540</sup> Co. Litt. 244a; *Rex v. Alberton*, 1 Ld. Raym. 395, 2 Salk. 483; *Reg. v. Murrey*, 1 Salk. 122. See *Wartone v. Simon*, Y. B. 32 & 33 Edw. I. (60), Thayer, Cas. Ev. 45; *Wright v. Hicks*, 12 Ga. 155, 56 A. D. 451; *Van Aernam v. Van Aernam*, 1 Barb. Ch. (N. Y.) 375; *Woodward v. Blue*, 107 N. C. 407, 22 A. S. R. 897.

<sup>541</sup> ENGLAND: *Rex v. Luffe*, 8 East, 193; *Hargrave v. Hargrave*, 9 Beav. 552; *Gurney v. Gurney*, 32 Law J. Ch. 456; *Rex v. Maldstone*, 12 East, 550; *Barony of Saye & Sele*, 1 H. L. Cas. 507; *Pendrell v. Pendrell*, 2 Strange, 925; *Hawes v. Draeger*, 23 Ch. Div. 173.

UNITED STATES: *Stegall v. Stegall's Adm'r*, 2 Brock. 256, Fed. Cas. No. 13,351.

INDIANA: *Dean v. State*, 29 Ind. 483.

IOWA: *Bruce v. Patterson*, 102 Iowa, 184.

LOUISIANA: *Tate v. Penne*, 7 Mart. (N. S.) 548, 554.

MASSACHUSETTS: *Randolph v. Easton*, 23 Pick. 242, 243.

MISSISSIPPI: *Herring v. Goodson*, 43 Miss. 392.

NEW YORK: *Cross v. Cross*, 3 Paige, 139, 23 A. D. 778; *Van Aernam v. Van Aernam*, 1 Barb. Ch. 375.

NORTH CAROLINA: *State v. Pettaway*, 10 N. C. (3 Hawks) 623; *State v. McDowell*, 101 N. C. 734.

PENNSYLVANIA: *Com. v. Shepherd*, 6 Bin. 283, 6 A. D. 449; *Dennison v. Page*, 29 Pa. 420, 72 A. D. 644.

SOUTH CAROLINA: *State v. Shumpert*, 1 Rich. 85.

VERMONT: *Pittsford v. Chittenden*, 58 Vt. 49.

WISCONSIN: *Shuman v. Hurd*, 79 Wis. 654, 657 (semble).

opportunity for access.<sup>542</sup> The presumption may also be dispelled by other evidence than that of impotency or nonaccess, however.<sup>543</sup> This is well illustrated by cases wherein a mulatto is born of a white woman, the husband also being white.<sup>544</sup>

The fact that the wife committed adultery at or about the

<sup>542</sup> *Reg. v. Mansfield*, 1 Q. B. 444, 1 Gale & D. 7; *Cope v. Cope*, 5 Car. & P. 604, 1 Moody & R. 269; *Banbury Peerage Case*, 1 Sim. & S. 153, *Thayer*, Cas. Ev. 45; *Morris v. Davis*, 5 Clark & F. 163, 256; *Atchley v. Sprigg*, 33 Law J. Ch. 345; *Woodward v. Blue*, 107 N. C. 407, 22 A. S. R. 897; *Cannon v. Cannon*, 7 Humph. (Tenn.) 410. See, however, *Hargrave v. Hargrave*, 9 Beav. 552, 555; *Bury v. Phillpot*, 2 Mylne & K. 349; *Wright v. Hicks*, 12 Ga. 155, 56 A. D. 451, 454, 15 Ga. 160, 60 A. D. 687; *Tate v. Penne*, 7 Mart. N. S. (La.) 548, 554; *Shuman v. Shuman*, 83 Wis. 250, 255.

<sup>543</sup> *Hawes v. Draeger*, 23 Ch. Div. 173; *Goodnight v. Saul*, 4 Term R. 356; *Wright v. Hicks*, 15 Ga. 160, 60 A. D. 687; *Sullivan v. Hugly*, 32 Ga. 316, 322; *Wilson v. Babb*, 18 S. C. 59. *Contra*, *Com. v. Shepherd*, 6 Bin. (Pa.) 283, 6 A. D. 449 (semble).

In the absence of evidence of nonaccess or impotency, the declarations and acts of the husband and wife at the birth of the child or subsequently are not admissible to prove it illegitimate. *Dennison v. Page*, 29 Pa. 420, 72 A. D. 644. See, however, *Morris v. Davis*, 5 Clark & F. 163, 242; *Stegall v. Stegall's Adm'r*, 2 Brock. 256, Fed. Cas. No. 13,351; *Wright v. Hicks*, 15 Ga. 160, 60 A. D. 687.

Conduct of the putative father is admissible in connection with evidence of nonaccess of the husband. *Woodward v. Blue*, 107 N. C. 407, 22 A. S. R. 897.

General reputation in the vicinage as to legitimacy is not admissible. *Wright v. Hicks*, 15 Ga. 160, 60 A. D. 687; *Strode v. Magowan's Heirs*, 2 Bush (Ky.) 621. See, however, *Stegall v. Stegall's Adm'r*, 2 Brock. 256, Fed. Cas. No. 13,351. Family reputation is admissible. *Hawes v. Draeger*, 23 Ch. Div. 173, 180 (semble); *Wright v. Hicks*, 15 Ga. 160, 60 A. D. 687; *Strode v. Magowan's Heirs*, 2 Bush (Ky.) 621.

<sup>544</sup> *Thayer*, Prel. Treat. Ev. 346; *Bullock v. Knox*, 96 Ala. 195; *Wright v. Hicks*, 12 Ga. 155, 56 A. D. 451, 455 (semble); *Warlick v. White*, 76 N. C. 175. See *Sullivan v. Hugly*, 32 Ga. 316, 322.

The presumption is also rebutted where the husband is black, the wife a mulatto, and the child white. *Cross v. Cross*, 3 Paige (N. Y.) 139, 23 A. D. 778, 780 (semble). And see *Woodward v. Blue*, 107 N. C. 407, 22 A. S. R. 897.

time when the child was conceived does not dispel the presumption of legitimacy, if she was then living with her husband,<sup>545</sup> or even where she was living apart from him, if there is no evidence of nonaccess on his part,<sup>546</sup> or, at least, if the circumstances are such that he might have had access to her.<sup>547</sup> In connection with circumstances tending to show nonaccess or impotency, however, misconduct on the part of the wife is a material circumstance in determining whether the presumption is rebutted.<sup>548</sup>

To rebut the presumption of legitimacy, the evidence of impotency or nonaccess on the husband's part must be clear and convincing.<sup>549</sup> If actual sexual intercourse between the spouses

<sup>545</sup> *Stegall v. Stegall's Adm'r*, 2 Brock. 256, Fed. Cas. No. 13,351 (semble); *Hemmenway v. Towner*, 1 Allen (Mass.) 209.

The fact that a third person ravished the wife at or about the time when the child was conceived does not disprove legitimacy, in the absence of evidence of nonaccess or impotency on the part of the husband. *Egbert v. Greenwalt*, 44 Mich. 245, 38 A. R. 260.

<sup>546</sup> *Reg. v. Mansfield*, 1 Q. B. 444, 1 Gale & D. 7; *Van Aernam v. Van Aernam*, 1 Barb. Ch. (N. Y.) 375.

<sup>547</sup> *Wright v. Holdgate*, 3 Car. & K. 158; *Hargrave v. Hargrave*, 9 Beav. 552; *Cope v. Cope*, 1 Moody & R. 269, 5 Car. & P. 604; *Plowes v. Bossey*, 31 Law J. Ch. 681, 683 (semble); *Bury v. Phillpot*, 2 Mylne & K. 349.

<sup>548</sup> *Morris v. Davis*, 5 Clark & F. 163, 256; *Sibbet v. Ainsley*, 3 Law T. (N. S.) 583; *Legge v. Edmonds*, 25 Law J. Ch. 125; *Atchley v. Sprigg*, 33 Law J. Ch. 345; *Cope v. Cope*, 1 Moody & R. 269, 5 Car. & P. 604; *Bruce v. Patterson*, 102 Iowa, 184; *Goss v. Froman*, 89 Ky. 312, 8 L. R. A. 102; *Cross v. Cross*, 3 Paige (N. Y.) 139, 23 A. D. 778; *Woodward v. Blue*, 107 N. C. 407, 22 A. S. R. 897; *Cannon v. Cannon*, 7 Humph. (Tenn.) 410.

<sup>549</sup> *Legge v. Edmonds*, 25 Law J. Ch. 125; *Bury's Case*, 5 Coke, 98b; *Head v. Head*, 1 Sim. & S. 150, Turn. & R. 138; *Lomax v. Holmden*, 2 Strange, 940; *Plowes v. Bossey*, 31 Law J. Ch. 681; *Morris v. Davis*, 5 Clark & F. 163, 265; *Hargrave v. Hargrave*, 9 Beav. 552; *Atchley v. Sprigg*, 33 Law J. Ch. 345; *Sullivan v. Hugly*, 32 Ga. 316, 322; *Bruce v. Patterson*, 102 Iowa, 184, 186; *State v. Romaine*, 58 Iowa, 46; *Vernon v. Vernon's Heirs*, 6 La. Ann. 242; *Phillips v. Allen*, 2 Allen (Mass.)

at or about the time when the child was conceived is proved, nothing will defeat the presumption short of impossibility of impregnation;<sup>550</sup> but in the absence of proof of actual sexual connection, the party disputing the presumption is not bound to show such facts as to render it impossible that sexual intercourse could have taken place between the spouses.<sup>551</sup>

#### O. LIFE, DEATH, AND SURVIVORSHIP.

##### § 61. Continuance of life.

Life, shown to have once existed, is presumed to continue for a reasonable length of time, in the absence of evidence to the contrary. If, therefore, a person is shown to have been alive at a particular time in the past, the presumption is that he is alive at a later time, and the burden of showing that he has died in the interim rests on the party who asserts it.<sup>552</sup>

453; *Sullivan v. Kelly*, 3 Allen (Mass.) 143; *Egbert v. Greenwalt*, 44 Mich. 245, 38 A. R. 260; *Cross v. Cross*, 3 Paige (N. Y.) 139, 23 A. D. 778; *Van Aernam v. Van Aernam*, 1 Barb. Ch. (N. Y.) 375; *Scott v. Hillenberg*, 85 Va. 245.

If the child is born so soon after marriage that it must have been begotten before that event, the evidence in rebuttal need not be so strong as in the ordinary case. *Wright v. Hicks*, 15 Ga. 160, 60 A. D. 687; *Wilson v. Babb*, 18 S. C. 59.

<sup>550</sup> *Morris v. Davis*, 5 Clark & F. 163, 243; *Wright v. Hicks*, 15 Ga. 160, 60 A. D. 687; *Cross v. Cross*, 3 Paige (N. Y.) 139, 23 A. D. 778; *Warlick v. White*, 76 N. C. 175, 177.

The same is true where it appears that the spouses slept together. *Legge v. Edmonds*, 25 Law J. Ch. 125.

<sup>551</sup> *Stegall v. Stegall's Adm'r*, 2 Brock. 256, Fed. Cas. No. 13,351; *Wright v. Hicks*, 15 Ga. 160, 60 A. D. 687; *Phillips v. Allen*, 2 Allen (Mass.) 453 (semble); *Van Aernam v. Van Aernam*, 1 Barb. Ch. (N. Y.) 375; *Shuler v. Bull*, 15 S. C. 421. *Contra*, *Patterson v. Gaines*, 6 How. (U. S.) 550.

<sup>552</sup> *Benson v. Olive*, 2 Strange, 920; *Wilson v. Hodges*, 2 East, 312; *Battin's Lessee v. Bigelow*, Pet. C. C. 452, Fed. Cas. No. 1,108; *Gilliland's Lessee v. Martin*, 3 McLean, 490, Fed. Cas. No. 5,433; *Stevens v. McNamara*, 36 Me. 176, 58 A. D. 740; *Peabody v. Hewett*, 52 Me. 33.



This presumption is not conclusive. It may be rebutted by evidence of facts and circumstances tending to dispel the probability of the continuance of life; and when such evidence has been adduced, the presumption vanishes, and the question of life becomes one of fact for the determination of the jury.<sup>553</sup>

The presumption of continuance of life may be indulged, even though the person in question is thereby assumed to live beyond the average age of man;<sup>554</sup> but it will not be presumed that a person is living if it involves an assumption of an age of one hundred years or more.<sup>555</sup>

#### § 62. Death of absentee.

If a person has been absent from his residence for a period

33 A. D. 486; *Schaub v. Griffin*, 84 Md. 557; *Com. v. McGrath*, 140 Mass. 296; *Hancock v. American L. Ins. Co.*, 62 Mo. 26; *Smith v. Knowlton*, 11 N. H. 191; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Com. v. Harman*, 4 Pa. 269; *Proctor v. McCall*, 2 Bailey (S. C.) 298, 23 A. D. 135. See, however, *Jarboe v. McAtee's Heirs*, 7 B. Mon. (Ky.) 279, 282; *Clafin v. B. & A. R. Co.*, 157 Mass. 489, 20 L. R. A. 638.

A presumption of death may arise, however, if a man has been absent and unheard of for seven years. See § 62, *infra*. But there is no presumption that a person who has been absent and unheard of for seven years continued to live until the expiration of that period, or until any particular time within that period. See § 62(d), *infra*.

<sup>553</sup> *Lapsley v. Grierson*, 1 H. L. Cas. 498; *State v. Plym*, 43 Minn. 385, *Thayer*, Cas. Ev. 60.

Presumption of continuance of life of absent spouse, as dispelled by subsequent remarriage of other spouse, see § 62(c).

Evidence tending to show death of an absentee within an earlier period than seven years, see § 62(c), *infra*.

<sup>554</sup> *Hall's Deposition*, 1 Wall. Jr. 85, Fed. Cas. No. 5,924; *Watson v. Tindal*, 24 Ga. 494, 71 A. D. 142; *Hammond's Lessee v. Inloes*, 4 Md. 138. See, however, *Innis v. Campbell*, 1 Rawle (Pa.) 373.

By the civil law, a man is presumed to live to the age of one hundred years, in the absence of evidence to the contrary. *Hayes v. Berwick*, 2 Mart. (La.) 138, 5 A. D. 727; *Willet v. Andrews*, 51 La. Ann. 486.

<sup>555</sup> *Miller v. McElwee*, 12 La. Ann. 476; *Hammond's Lessee v. Inloes*, 4 Md. 138. And see *Young v. Schulenberg*, 165 N. Y. 385.

of seven years, and in that time he has not been heard of by any one who would naturally hear of him were he alive, a presumption arises that he is dead,<sup>556</sup> unless the circumstances are such as to account for his not being heard of without assuming his death.<sup>557</sup>

**(a) Residence of absentees.** Absence from the supposed de-

<sup>556</sup> Doe d. Lloyd v. Deakin, 4 Barn. & Ald. 433 (semble); Hopewell v. De Pinna, 2 Camp. 113; Davie v. Briggs, 97 U. S. 628; Crawford v. Elliott, 1 Houst. (Del.) 465; Doe d. Cofer v. Roe, 1 Kelly (Ga.) 538; Adams' Ex'rs v. Jones' Adm'r, 39 Ga. 479; Watson v. Adams, 103 Ga. 733; Ryan v. Tudor, 31 Kan. 366; Rockland v. Morrill, 71 Me. 455, 456; Hyde Park v. Canton, 130 Mass. 505, 507 (semble); Stockbridge's Petition, 145 Mass. 517; Winship v. Conner, 42 N. H. 341; Lewis v. Mobley, 20 N. C. (4 Dev. & B.) 323, 34 A. D. 379; University of N. C. v. Harrison, 90 N. C. 385; Burr v. Sim, 4 Whart. (Pa.) 150, 33 A. D. 50; Bradley v. Bradley, 4 Whart. (Pa.) 173; Woods v. Woods' Adm'r, 2 Bay (S. C.) 476; Bardin v. Bardin, 4 S. D. 305, 46 A. S. R. 791; Primm v. Stewart, 7 Tex. 178; Whiteley v. Equitable L. A. Soc., 72 Wis. 170.

For a history of this presumption, see Thayer, Prel. Treat. Ev. 319. And see, generally, 7 Current Law, 1082.

In the following cases the presumption was in process of development: Doe d. George v. Jesson, 6 East, 80, Thayer, Cas. Ev. 52; Miller v. Beates, 3 Serg. & R. (Pa.) 490, 8 A. D. 658.

This presumption does not obtain in the civil law. Hayes v. Berwick, 2 Mart. (La.) 138, 5 A. D. 727.

The presumption is governed by statute in some states. Louisville Bank v. Trustees of Public Schools, 83 Ky. 219; Boyd v. New England M. L. Ins. Co., 34 La. Ann. 848; Learned v. Corley, 43 Miss. 687; Hoyt v. Newbold, 45 N. J. Law, 219, 46 A. R. 757; Osborn v. Allen, 26 N. J. Law, 388; Wambaugh v. Schenck, 2 N. J. Law, 167; Smith v. Combs, 49 N. J. Eq. 420; Smith v. Smith's Ex'rs, 5 N. J. Eq. 484.

<sup>557</sup> Watson v. England, 14 Sim. 28; Bowden v. Henderson, 2 Smale & G. 360; Baden v. McKenny, 7 Mackey (D. C.) 268.

It seems that the presumption does not apply to children of tender years who have no control over their movements. Manley v. Pattison, 73 Miss. 417, 55 A. S. R. 543.

In some cases, the fact that the absentee left for temporary purposes seems to be essential to the creation of the presumption. Wentworth v. Wentworth, 71 Me. 72; Johnson v. Merithew, 80 Me. 111, 6 A. S. R. 162; Loring v. Steineman, 1 Metc. (Mass.) 204.

cedent's residence must be shown, else the presumption of death does not arise.<sup>558</sup> Accordingly, one's absence from a particular place raises no presumption of his death where there is no evidence that he had established his residence there.<sup>559</sup>

The presumption assumes the death of absentees only. The rule does not allow a living absentee to assume the death of those whom he left behind him.<sup>560</sup> Thus, if a woman deserts her husband, and remains away for more than seven years without hearing of him, a presumption of his death does not arise in her favor.<sup>561</sup>

Absence of seven years, to give rise to a presumption of death, must be absence from the last residence or place of resort of the person in question. Seven years' absence from an earlier residence is not sufficient.<sup>562</sup> It follows that, before the presumption can arise, it must appear that inquiry has been made at the residence of the absentee abroad, if he had a residence there.<sup>563</sup>

The burden of showing a change of residence or domicile rests, it seems, on the party who asserts it. Mere abandonment of residence does not defeat the presumption of death

<sup>558</sup> *Spurr v. Trimble*, 1 A. K. Marsh. (Ky.) 278; *Thomas v. Thomas*, 16 Neb. 553; *Puckett v. State*, 1 Sneed (Tenn.) 355. See *Doe d. France v. Andrews*, 15 Q. B. 756; *Hall's Deposition*, 1 Wall. Jr. 85, Fed. Cas. No. 5,924; *Garwood v. Hastings*, 38 Cal. 217.

<sup>559</sup> *Stinchfield v. Emerson*, 52 Me. 465, 83 A. D. 524.

<sup>560</sup> *Faulkner's Adm'r v. Williman*, 13 Ky. L. R. 106, 16 S. W. 352; *Hyde Park v. Canton*, 130 Mass. 505, 507 (semble).

<sup>561</sup> *Com. v. Thompson*, 11 Allen (Mass.) 23, 87 A. D. 685. And see *Thomas v. Thomas*, 16 Neb. 553.

<sup>562</sup> *Hitz v. Ahlgren*, 170 Ill. 60; *Gray v. McDowell*, 6 Bush (Ky.) 475; *Keller v. Stuck*, 4 Redf. (N. Y.) 294; *Francis v. Francis*, 180 Pa. 644, 57 A. S. R. 668.

<sup>563</sup> *In re Creed*, 1 Drew. 235; *McMahon v. McElroy*, Ir. Rep. 5 Eq. 1; *Wentworth v. Wentworth*, 71 Me. 72, 74 (semble); *McCartee v. Camel*, 1 Barb. Ch. (N. Y.) 455.

arising from seven years' absence from that residence, if it does not appear that a new residence has been gained.<sup>564</sup>

Absence from the United States or from the state is not necessary to raise the presumption. Seven years' absence from the last known residence or place of resort of the person in question, coupled with lack of intelligence, is sufficient to raise the presumption without a showing of absence from the state or country.<sup>565</sup>

(b) **Lack of tidings.** One of the essential facts on which the presumption is founded is that the absentee has not been heard of by those who would naturally hear of him were he living. The fact that mere acquaintances or persons with whom he was not on good terms have not heard of him is not, as a rule, sufficient to raise the presumption.<sup>566</sup>

(c) **Time of absence.** To raise the presumption of death, the absence must be for the full period of seven years or longer.<sup>567</sup> This period was inserted in early English statutes relating to

<sup>564</sup> *Winship v. Conner*, 42 N. H. 341.

<sup>565</sup> *Doe d. Coper v. Roe*, 1 Kelly (Ga.) 538, 543.

<sup>566</sup> *Doe d. France v. Andrews*, 15 Q. B. 756; *McMahon v. McElroy*, Ir. Rep. 5 Eq. 1; *Hitz v. Ahlgren*, 170 Ill. 60; *Wentworth v. Wentworth*, 71 Me. 72, 74 (semble); *Manley v. Pattison*, 73 Miss. 417, 55 A. S. R. 543 (semble); *Thomas v. Thomas*, 16 Neb. 553; *Brown v. Jewett*, 18 N. H. 230, 232 (semble). And see *Hall's Deposition*, 1 Wall. Jr. 85, Fed. Cas. No. 5,924; *Smith v. Smith*, 49 Ala. 156. See § 62(e), *infra*. In so far as the facts of the case tend to bring it in conflict with the rule stated in the text, the case of *Garwood v. Hastings*, 38 Cal. 216, is thought to be unfounded in law.

<sup>567</sup> *Ashbury v. Sanders*, 8 Cal. 62, 68 A. D. 300; *Cone v. Dunham*, 59 Conn. 145, 8 L. R. A. 647; *Whiting v. Nicholl*, 46 Ill. 230, 92 A. D. 248; *State v. Henke*, 58 Iowa, 457; *Ryan v. Tudor*, 31 Kan. 366; *Stevens v. McNamara*, 36 Me. 176, 58 A. D. 740; *Newman v. Jenkins*, 10 Pick. (Mass.) 515; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Stouvenel v. Stephens*, 2 Daly (N. Y.) 319; *Mut. Ben. Co.'s Petition*, 174 Pa. 1, 52 A. S. R. 814.

bigamy and to leases and estates depending upon the life of a person who should go beyond the seas or otherwise absent himself within the kingdom, and finally came to be adopted by the courts in other cases from analogy.<sup>568</sup>

While seven years' absence is required to raise the presumption of law, yet the facts of the particular case may be such as to justify an inference of death within a shorter period.<sup>569</sup> If, for instance, the absentee, when last heard of, was in desperate health,<sup>570</sup> or of dissipated habits,<sup>571</sup> either of these facts, coupled with unexplained absence and lack of tidings, may justify an inference of death. So, if the absentee is known to have encountered a specific peril of unusual risk, since which time he has not been heard of, an inference of death is justified;<sup>572</sup> and the same is true where the absentee is known to have sailed on a voyage which should long since have been completed, and neither vessel, crew, nor passengers have since been heard of.<sup>573</sup> Evidence of the absentee's character, habits,

<sup>568</sup> Thayer, *Prel. Treat. Ev.* 319; *Greenl. Ev.* § 41.

<sup>569</sup> *In re Matthews*, 67 *Law J. Prob.* 11, [1898] *Prob. Div.* 17, 77 *Law T.* (N. S.) 630; *Garden v. Garden*, 2 *Houst. (Del.)* 574; *Waite v. Coaracy*, 45 *Minn.* 159; *Puckett v. State*, 1 *Sneed (Tenn.)* 355.

<sup>570</sup> *Danby v. Danby*, 5 *Jur. N. S.* (pt. 1) 54; *In re Beasley's Trusts*, *L. R.* 7 *Eq.* 498; *Webster v. Birchmore*, 13 *Ves.* 362; *Leach v. Hall*, 95 *Iowa*, 611; *In re Ackerman*, 2 *Redf. (N. Y.)* 521. And see *Wagoner v. Wagoner*, 128 *Mich.* 635; *Wilkie v. Collins*, 48 *Miss.* 496.

<sup>571</sup> *In re Beasley's Trusts*, *L. R.* 7 *Eq.* 498; *Stouvenel v. Stephens*, 2 *Daly (N. Y.)* 319.

<sup>572</sup> *Rex v. Twynning*, 2 *Barn. & Ald.* 386; *Davie v. Briggs*, 97 *U. S.* 628; *Boyd v. New England M. L. Ins. Co.*, 34 *La. Ann.* 848; *Lancaster v. Wash. L. Ins. Co.*, 62 *Mo.* 121.

To raise the presumption of death within a less period than seven years, the unusual risk must be a specific one. *Mut. Ben. Co.'s Petition*, 174 *Pa.* 1, 52 *A. S. R.* 814.

<sup>573</sup> *In re Hutton*, 1 *Curt. Ecc.* 595; *Watson v. King*, 1 *Starkie*, 121; *Lakin v. Lakin*, 34 *Beav.* 443 (semble); *In re Main*, 1 *Swab. & Tr.* 11; *In re Norris*, 1 *Swab. & Tr.* 6; *In re Cooke, Ir. Rep.* 5 *Eq.* 240; *White v. Mann*, 26 *Me.* 361; *Johnson v. Merithew*, 80 *Me.* 111, 6 *A. S. R.* 162;

domestic and business relations, and the like, making the abandonment of home improbable, may also justify an inference of death, even though seven years have not elapsed since his disappearance.<sup>574</sup> In these cases, it is to be borne in mind, the fact of death is inferred, not presumed. To give rise to the presumption of death from mere absence, unheard of, a period of seven years must elapse.<sup>575</sup>

— **Death of absent spouse.** An apparent exception to this latter rule exists in cases where one spouse abandons the other, and the latter, within a period of seven years, remarries. The fact of remarriage, in connection with long absence of the former spouse, or other circumstances, may rebut the presumption of the absentee's continuance in life; and it is often presumed, in favor of the second marriage, that at the time it was consummated the absentee was dead, and the burden of showing the contrary is accordingly cast on the party who attacks the marriage.<sup>576</sup> The courts, by giving the presumption of

*Gerry v. Post*, 13 How. Pr. (N. Y.) 118; *Gibbes v. Vincent*, 11 Rich. Law (S. C.) 323. *Contra*, *Ashbury v. Sanders*, 8 Cal. 62, 68 A. D. 300.

If no intelligence is received of a vessel within a reasonable time after she leaves port for a certain voyage, the presumption is that she has foundered at sea. *Houstman v. Thornton*, Holt N. P. 242; *Green v. Brown*, 2 Strange, 1199; *Gordon v. Bowne*, 2 Johns. (N. Y.) 150. See *Twemlow v. Oswin*, 2 Camp. 85; *In re Bishop*, 1 Swab. & Tr. 303; *King v. Paddock*, 18 Johns. (N. Y.) 141. The mere fact of his having gone to sea, however, will not justify a presumption of the absentee's death within a less time than seven years. *Smith v. Knowlton*, 11 N. H. 191; *Burr v. Sim*, 4 Whart. (Pa.) 150, 33 A. D. 50.

<sup>574</sup> *Sensenderfer v. Pac. M. L. Ins. Co.*, 19 Fed. 68; *Tisdale v. Conn. M. L. Ins. Co.*, 26 Iowa, 170, 96 A. D. 136; *Ryan v. Tudor*, 31 Kan. 366; *Cox v. Ellsworth*, 18 Neb. 664, 53 A. R. 827. See, however, *Mut. Ben. Co.'s Petition*, 174 Pa. 1, 52 A. S. R. 814.

<sup>575</sup> Cases cited in note 567, *supra*.

<sup>576</sup> *Rex v. Twyning*, 2 Barn. & Ald. 386; *Sharp v. Johnson*, 22 Ark. 79; *Cash v. Cash*, 67 Ark. 278; *Johnson v. Johnson*, 114 Ill. 611, 55 A. R. 883; *Cartwright v. McGown*, 121 Ill. 388, 2 A. S. R. 105 (semble); *Squire v. State*, 46 Ind. 459; *Cooper v. Cooper*, 86 Ind. 75; *McCaffrey v. Benson*, 38 La. Ann. 198; *Le Brun v. Le Brun*, 55 Md. 496; *Spears*

*Hammon*, Ev.—17.

death this effect on the burden of proof, necessarily brand it as a presumption of law.<sup>577</sup> In many cases, however, the circumstances are such as to create a presumption of fact merely; that is to say, the fact of remarriage under some circumstances does not necessitate a finding of death, as does the presumption of law, but merely justifies such a finding if it seems reasonable to the jury to make it. Here, therefore, the question of life or death is one for the jury, and a finding either way will be sustained.<sup>578</sup>

v. Burton, 31 Miss. 547; Wilkie v. Collins, 48 Miss. 496; Klein v. Laudman, 29 Mo. 259; Chapman v. Cooper, 5 Rich. Law (S. C.) 452; Nixon v. Wichita L. & C. Co., 84 Tex. 408; Carroll v. Carroll, 20 Tex. 731; Lockhart v. White, 18 Tex. 102; Greensborough v. Underhill, 12 Vt. 604.

This presumption does not arise in favor of a man who leaves the state with his wife, and returns shortly after with another woman, and cohabits with her. Howard v. State, 75 Ala. 27.

<sup>577</sup> See page 50, *supra*.

<sup>578</sup> ENGLAND: Rex v. Harborne, 2 Adol. & E. 540; Reg. v. Willshire, 6 Q. B. Div. 366; Reg. v. Lumley, L. R. 1 Cr. Cas. 196.

ALABAMA: Parker v. State, 77 Ala. 47, 54 A. R. 43.

CALIFORNIA: Hunter v. Hunter, 111 Cal. 261, 52 A. S. R. 180; People v. Fellen, 58 Cal. 218, 41 A. R. 258.

MASSACHUSETTS: Kelly v. Drew, 12 Allen, 107, 90 A. D. 138; Com. v. McGrath, 140 Mass. 296; Com. v. Caponi, 155 Mass. 534.

MICHIGAN: Wagoner v. Wagoner, 128 Mich. 635; Dixon v. People, 18 Mich. 84.

MINNESOTA: State v. Plym, 43 Minn. 385, Thayer, Cas. Ev. 60.

MISSISSIPPI: Hull v. Rawls, 27 Miss. 471.

NEBRASKA: Reynolds v. State, 58 Neb. 49.

PENNSYLVANIA: Breiden v. Paff, 12 Serg. & R. 430.

TEXAS: Yates v. Houston, 3 Tex. 433; Gorman v. State, 23 Tex. 646.

WEST VIRGINIA: State v. Goodrich, 14 W. Va. 834.

WISCONSIN: Williams v. Williams, 63 Wis. 58, 53 A. R. 253, 257 (semble).

In some cases the circumstances have been held insufficient as a matter of law to justify a finding that the former spouse was dead. Hyde Park v. Canton, 130 Mass. 505.

— **Letters of administration—Letters testamentary.** The grant of letters of administration<sup>579</sup> or of letters testamentary<sup>580</sup> also makes, in collateral proceedings, a prima facie case of the death of the absentee, without reference to the time of his absence.

(d) **Time of death.** The presumption of death arising from seven years' absence without tidings assumes the fact that the absentee is dead after the expiration of the seven years, and this is all that it assumes. The court cannot presume that life continued during the seven years' period, or any part of it, nor that it did not so continue. It cannot presume that death occurred at or before the expiration of that time; nor that it did not so occur. To whosoever case it is essential that the absentee continued to live during the seven years' period, or any part of it, on the one hand, or that the absentee died at or before the lapse of that time, on the other hand, on that party lies the burden of proof.<sup>581</sup> In some states, however, this.

In Maine, the statute places the burden of proving death of the former spouse on the spouse subsequently remarrying. *Harrison v. Lincoln*, 48 Me. 205.

<sup>579</sup> *Jenkins v. Peckinpaugh*, 40 Ind. 133; *Tisdale v. Conn. M. L. Ins. Co.*, 26 Iowa, 170, 96 A. D. 136; *French v. Frazier's Adm'r*, 7 J. J. Marsh. (Ky.) 425; *Peterkin v. Inloes*, 4 Md. 175; *Newman v. Jenkins*, 10 Pick. (Mass.) 515; *Lancaster v. Wash. L. Ins. Co.*, 62 Mo. 121; *Jeffers v. Radcliff*, 10 N. H. 242.

<sup>580</sup> *Hurlburt v. Van Wormer*, 14 Fed. 709. See *Doe d. Hall v. Penfold*, 8 Car. & P. 536.

<sup>581</sup> *Nepean v. Knight*, 2 Mees. & W. 894, 910, *Thayer, Cas. Ev.* 54; *In re Lewes' Trusts*, L. R. 11 Eq. 236, 6 Ch. App. 356; *In re Phene's Trusts*, 5 Ch. App. 139, *Thayer, Cas. Ev.* 57; *In re Corbishley's Trusts*, 14 Ch. Div. 846; *In re Benjamin*, 71 Law J. Ch. 319, [1902] 1 Ch. 723, 86 Law T. (N. S.) 287; *Rhodes v. Rhodes*, 36 Ch. Div. 586; *Doe d. Hagerman v. Strong*, 4 U. C. Q. B. 510, 8 U. C. Q. B. 291; *Davie v. Briggs*, 97 U. S. 628; *Johnson v. Johnson*, 114 Ill. 611, 616 (semble); *Johnson v. Merithew*, 80 Me. 111, 6 A. S. R. 162; *Schaub v. Griffin*, 84 Md. 557; *Sprigg v. Moale*, 28 Md. 497, 92 A. D. 698; *Hancock v. American L. Ins. Co.*, 62 Mo. 26; *McCartee v. Camel*, 1 Barb. Ch. (N. Y.)



view does not fully prevail, and it is held that the presumption of continuance of life operates up to the close of the seven years' period, and that the burden of showing death before that time rests on the party asserting it.<sup>582</sup>

**(e) Rebuttal of presumption.** The presumption of death arising from seven years' absence is a presumption of law, but it is not conclusive; its sole effect is to cast on the party against whom it operates the burden of adducing evidence that the absentee was living after the close of that period.<sup>583</sup>

To rebut the presumption, it is not necessary to produce persons who have seen the absentee, nor, in some jurisdictions,

455; *State v. Moore*, 33 N. C. (11 Ired.) 160, 53 A. D. 401 (semble); *Spencer v. Roper*, 35 N. C. (13 Ired.) 333; *Whiteley v. Equitable L. A. Soc.*, 72 Wis. 170.

Death within the seven years' period may be shown by circumstantial evidence. *Hickman v. Upsall*, L. R. 20 Eq. 136, 4 Ch. Div. 144; *Sillick v. Booth*, 1 Younge & C. Ch. 117; *Hancock v. American L. Ins. Co.*, 62 Mo. 26; *Smith v. Knowlton*, 11 N. H. 191; *Sheldon v. Ferris*, 45 Barb. (N. Y.) 124; *Shown v. McMackin*, 9 Lea (Tenn.) 601, 42 A. R. 681. And see *Cambrelleng v. Purton*, 125 N. Y. 610.

<sup>582</sup> *Montgomery v. Bevans*, 1 Sawy. 653, Fed. Cas. No. 9,735; *Whiting v. Nicholl*, 46 Ill. 230, 92 A. D. 248; *Reedy v. Millizen*, 155 Ill. 636; *Smith v. Knowlton*, 11 N. H. 191; *Clarke's Ex'rs v. Canfield*, 15 N. J. Eq. 119; *Eagle v. Emmet*, 4 Bradf. Sur. (N. Y.) 117, 3 Abb. Pr. 218; *Mut. Ben. Co.'s Petition*, 174 Pa. 1, 52 A. S. R. 814; *Corley v. Holloway*, 22 S. C. 380. And see *In re Tindall's Trust*, 30 Beav. 151.

<sup>583</sup> *Adams' Ex'rs v. Jones' Adm'r*, 39 Ga. 479; *Loring v. Steineman*, 1 Metc. (Mass.) 204, 211 (semble); *Com. v. Thompson*, 6 Allen (Mass.) 591, 83 A. D. 653; *Dowd v. Watson*, 105 N. C. 476, 18 A. S. R. 920; *Youngs v. Heffner*, 36 Ohio St. 232; *Thomas v. Thomas*, 124 Pa. 646.

In some cases this presumption has been termed a presumption of fact, though erroneously. *Flynn v. Coffee*, 12 Allen (Mass.) 133, 134; *Dowd v. Watson*, 105 N. C. 476, 18 A. S. R. 920. Doubtless all that was meant is that the presumption is disputable, which is correct.

In some states it is declared by statute that if a spouse has been absent for five years, unheard of, and the other remarries, the second marriage is valid until annulled by decree, although the absent spouse be living. *Charles v. Charles*, 41 Minn. 201; *Price v. Price*, 124 N. Y. 589. And see *Bardin v. Bardin*, 4 S. D. 305, 46 A. S. R. 791.

to produce letters received from him, within the seven years' period. The rule against hearsay is said not to apply. It is accordingly competent to show that the absentee was reported among his relatives, friends, or acquaintances to have been alive within that period.<sup>584</sup> If the report is vague, and is shown to be without foundation, it is not sufficient to overcome the presumption,<sup>585</sup> but its vagueness and lack of foundation go to its weight as evidence, not to its admissibility. Thus, a witness has been allowed to testify that a third person had told him that he (the speaker) had seen the absentee within the seven years.<sup>586</sup> So, a witness may testify that he has received a letter from the supposed decedent within that period.<sup>587</sup>

The presumption may be rebutted by evidence that the absentee has been heard from within seven years by any person whomsoever, whether or not such person is one who would naturally hear from the absentee,<sup>588</sup> and it is competent to show that the absentee has been mentioned in official proceedings as having been alive within the seven years' period.<sup>589</sup>

The presumption of death arising from the grant of letters of administration or letters testamentary is also rebuttable, and, moreover, is said to be of little weight.<sup>590</sup>

<sup>584</sup> *Flynn v. Coffee*, 12 Allen (Mass.) 133; *Dowd v. Watson*, 105 N. C. 476, 18 A. S. R. 920.

<sup>585</sup> *Den d. Moore v. Parker*, 34 N. C. (12 Ired.) 123.

<sup>586</sup> *Dowd v. Watson*, 105 N. C. 476, 18 A. S. R. 920.

Testimony that the witness himself has seen the supposed decedent within seven years of course rebuts the presumption of death. *O'Kelly v. Felker*, 71 Ga. 775.

<sup>587</sup> *Smith v. Smith*, 49 Ala. 156.

In some states, however, the letter must be produced and verified, unless it has been lost or destroyed. *Brown v. Jewett*, 18 N. H. 230.

<sup>588</sup> *Wentworth v. Wentworth*, 71 Me. 72, 74 (semble); *Flynn v. Coffee*, 12 Allen (Mass.) 133.

<sup>589</sup> *Keech v. Rinehart*, 10 Pa. 240.

(f) **Effect of presumption.** In the absence of evidence in rebuttal, the presumption of death arising from absence operates, so far as the particular case is concerned, to establish the absentee's death as a fact.

In criminal cases the presumption will be given effect in determining whether the act of the accused was lawful. Thus, in a trial for adultery with a married woman, if it appears that at the time the acts in question occurred the husband had been absent and unheard of for seven years, the prosecution fails, although it appears in the trial that the husband was then living.<sup>591</sup> In trials for murder, however, this presumption is not given effect with reference to the *corpus delicti*. Proof of death is not dispensed with by the fact that the alleged victim has been absent and unheard of for more than seven years.<sup>592</sup>

In civil cases death established by means of this presumption is equivalent to actual death, so far as the parties to the suit are concerned as between themselves, provided it does not appear in the trial that the absentee was living at the time in question,<sup>593</sup> but the rights of the absentee are not affected thereby, if in fact he is living. Accordingly, if his property is disposed of by the court upon the assumption of his death, and he subsequently appears, he may recover it back.<sup>594</sup> So, if an

<sup>590</sup> *Tisdale v. Conn. M. L. Ins. Co.*, 26 Iowa, 170, 96 A. D. 136; *Lancaster v. Wash. L. Ins. Co.*, 62 Mo. 121.

In an action by the administrator, the question of the validity of the appointment must be raised by plea in abatement, else the letters are conclusive of the fact of death. *Newman v. Jenkins*, 10 Pick. (Mass.) 515.

In some states this presumption has been held to be conclusive in collateral proceedings. *Jenkins v. Peckinpaugh*, 40 Ind. 133.

<sup>591</sup> *Com. v. Thompson*, 6 Allen (Mass.) 591, 83 A. D. 653.

<sup>592</sup> *Ruloff v. People*, 18 N. Y. 179.

<sup>593</sup> Rebuttal of presumption, see § 62(e), *supra*.

<sup>594</sup> *Doe d. Lloyd v. Deakin*, 4 Barn. & Ald. 433, 434 (semble); *Younga v. Heffner*, 36 Ohio St. 232.

administrator of his estate is appointed upon the erroneous assumption of his death, payment made to the administrator by a debtor of the absentee does not bar a recovery of the debt by the latter upon his subsequent reappearance.<sup>598</sup>

### § 63. Survivorship.

If two or more persons perish in a common disaster, and nothing more appears, there is no presumption, either of law or of fact, with reference to the relative moments of their respective deaths. Accordingly, if a party litigant makes an assertion with respect to the matter, he has the burden of establishing its truth.<sup>599</sup>

The court sometimes requires a refunding bond of the distributees, so as to protect the rights of the absentee in case he should reappear. *Cuthbert v. Purrier*, 2 Phillips, 199; *Dowley v. Winfield*, 14 Sim. 277; *In re Milleham's Trust*, 15 Beav. 507.

<sup>598</sup> *Thomas v. People*, 107 Ill. 517, 47 A. R. 458; *Jochumsen v. Suffolk Sav. Bank*, 3 Allen (Mass.) 87; *Devlin v. Com.*, 101 Pa. 273, 47 A. R. 710.

The contrary has been intimated where the payment to the administrator is made under order of court. *Schaub v. Griffin*, 84 Md. 557.

In New York the statutes have altered the rule stated in the text. *Roderigas v. E. R. Sav. Inst.*, 63 N. Y. 460, 20 A. R. 555, 76 N. Y. 316, 32 A. R. 309.

<sup>599</sup> *Battle*. *Cook v. Caswell*, 81 Tex. 678, 683 (semble).

*Fire*. *Middeke v. Balder*, 198 Ill. 590, 92 A. S. R. 284; *In re Willbor*, 20 R. I. 126, 51 L. R. A. 863; *In re Ehle's Will*, 73 Wis. 445.

*Flood*. *Russell v. Hallett*, 23 Kan. 276; *Cowman v. Rogers*, 73 Md. 403, *Thayer*, Cas. Ev. 63.

*Railroad wreck*. *Kan. Pac. R. Co. v. Miller*, 2 Colo. 442, 464.

*Shipwreck*. *Taylor v. Diplock*, 2 Phillim. Ecc. 261; *In re Selwyn*, 3 Hagg. Ecc. 748; *In re Murray*, 1 Curt. Ecc. 596; *Wright v. Netherwood*, 2 Salk. 593; *Underwood v. Wing*, 19 Beav. 459, 4 De Gex, M. & G. 633; *Mason v. Mason*, 1 Mer. 308, 312; *Wollaston v. Berkeley*, 2 Ch. Div. 213, 215; *Wing v. Angrave*, 8 H. L. Cas. 183; *Robinson v. Gallier*, 2 Woods, 178, Fed. Cas. No. 11,951; *Smith v. Croom*, 7 Fla. 81; *Johnson v. Merithew*, 80 Me. 111, 6 A. S. R. 162; *Coye v. Leach*, 8 Metc. (Mass.)

There being no presumption of survivorship, it follows that the rights of the parties litigant are often disposed of as if the persons in question had died simultaneously; yet there is no presumption of a simultaneous death.<sup>597</sup> Cases are found, indeed, wherein it is said that persons perishing in a common disaster must be presumed to have died at the same time.<sup>598</sup> It should be observed, however, that these are not cases wherein it was necessary to prove that the persons died simultaneously. On the contrary, the statements will be found to be mere dicta, put out in overruling the argument that the court should presume that one person survived the other. It thus appears that the question of survivorship is one of fact to be established by evidence to the satisfaction of the jury, unaided and unhampered by any presumption of law.

The evidence most commonly adduced in this connection touches the physical condition of the persons who perished; the natural inference being, when other things are equal, that

371, 41 A. D. 518; *Fuller v. Linzee*, 135 Mass. 468; *U. S. Casualty Co. v. Kacer*, 169 Mo. 301, 92 A. S. R. 641; *Newell v. Nichols*, 75 N. Y. 78, 31 A. R. 424; *Stinde v. Goodrich*, 3 Redf. (N. Y.) 87; *In re Ridgway*, 4 Redf. (N. Y.) 226; *Stinde v. Ridgway*, 55 How. Pr. (N. Y.) 301; *Pell v. Ball, Cheves, Eq.* (S. C.) 99. And see *Moehring v. Mitchell*, 1 Barb. Ch. (N. Y.) 264; *In re Gerdes' Estate*, 100 N. Y. Supp. 440.

Of two persons lost at sea, it does not necessarily follow that the one last seen alive was the survivor, in the absence of evidence of the earlier death of the other, though such an inference is justified. *Stinde v. Ridgway*, 55 How. Pr. (N. Y.) 301; *In re Ridgway*, 4 Redf. (N. Y.) 226; *Pell v. Ball, Cheves, Eq.* (S. C.) 99.

A presumption of survivorship is created by statute in some states. *Sanders v. Simcich*, 65 Cal. 50; *Hollister v. Cordero*, 76 Cal. 649; *Robinson v. Gallier*, 2 Woods, 178, Fed. Cas. No. 11,951.

<sup>597</sup> *Wing v. Angrave*, 8 H. L. Cas. 183; *Middeke v. Balder*, 198 Ill. 590, 92 A. S. R. 284; *Cowman v. Rogers*, 73 Md. 403, *Thayer*, Cas. Ev. 63, 64.

<sup>598</sup> *Satterthwaite v. Powell*, 1 Curt. Ecc. 705; *Kan. Pac. R. Co. v. Miller*, 2 Colo. 442, 464.

the stronger survived the weaker. As bearing on the question of endurance, it is usual to show the relative ages of the parties and their sex.<sup>599</sup> As between male and female, other things being equal, the natural inference is that the male succumbed last.<sup>600</sup> If both persons were in the prime of life at the time of the catastrophe, a difference in their ages has but little weight on the question of survivorship. Nor would it lead to conviction where one person was extremely old and the other extremely young, since in such a case, also, their endurance might well be equal. But if one person was in the prime of life, and the other had not reached that stage or had passed it, then the difference in their years is an important factor in determining which succumbed first.<sup>601</sup> It must constantly be borne in mind, however, that difference in sex and disparity in age give rise to no presumption concerning survivorship. They are merely circumstances from which an inference may be drawn, the question of survivorship being in all cases one for the jury.

#### § 64. Cause of death.

Where death occurs in an unknown manner, the presumption is that it did not come about by self-destruction.<sup>602</sup> This presumption finds frequent application in cases of life insurance, and operates in favor of the beneficiary, and against the insurer. Consequently, if the insurer seeks to avoid payment of the policy on the ground of suicide, it carries the burden

<sup>599</sup> See *Smith v. Croom*, 7 Fla. 81; *Pell v. Ball*, Cheves Eq. (S. C.) 99.

<sup>600</sup> *Colvin v. Procurator-General*, 1 Hagg. Ecc. 92; *Coye v. Leach*, 8 Metc. (Mass.) 371, 41 A. D. 518, 520 (semble); *Moehring v. Mitchell*, 1 Barb. Ch. (N. Y.) 264 (semble).

<sup>601</sup> *Coye v. Leach*, 8 Metc. (Mass.) 371, 41 A. D. 518 (semble).

<sup>602</sup> This presumption should not be given the jury in a trial for murder, where the evidence justifies either of two theories of death, one homicidal, the other suicidal. *Persons v. State*, 90 Tenn. 291; *Masonic Life Ass'n of Western N. Y. v. Pollard's Guardian* (Ky.) 89 S. W. 219.

of establishing that fact as an affirmative defense to an action on the policy.<sup>603</sup>

In an action on an accident policy, the burden of showing that death was due to accident rests on the beneficiary.<sup>604</sup> If, however, the beneficiary adduces evidence that death was due to accidental means, the burden is on the insurer to show that it arose from a cause excepted by the contract.<sup>605</sup>

<sup>603</sup> *Stormont v. Waterloo L. & C. A. Co.*, 1 Fost. & F. 22; *Wright v. Sun M. L. Ins. Co.*, 29 U. C. C. P. 221; *Home Ben. Ass'n v. Sargent*, 142 U. S. 691; *Dennis v. Union M. L. Ins. Co.*, 84 Cal. 570; *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill. 35; *Inghram v. Nat. Union*, 103 Iowa, 395; *Mut. L. Ins. Co. v. Wiswell*, 56 Kan. 765; *Phillips v. La. E. L. Ins. Co.*, 26 La. Ann. 404, 21 A. R. 549; *John Hancock M. L. Ins. Co. v. Moore*, 34 Mich. 41; *Goldschmidt v. Mut. L. Ins. Co.*, 102 N. Y. 486; *Cox v. Royal Tribe*, 42 Or. 365, 60 L. R. A. 620; *Continental Ins. Co. v. Delpeuch*, 82 Pa. 225; *Walcott v. Metropolitan L. Ins. Co.*, 64 Vt. 221, 33 A. S. R. 923; *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116, 17 A. S. R. 184.

If it appears that death was due to either accident or suicide, the presumption is against suicide. *Standard L. & A. Ins. Co. v. Thornton*, 100 Fed. 582; *Dennis v. Union M. L. Ins. Co.*, 84 Cal. 570; *Carnes v. Iowa State T. M. Ass'n*, 106 Iowa, 281, 68 A. S. R. 306; *Boynton v. Equitable L. A. Co.*, 105 La. 202, 52 L. R. A. 687; *Hale v. Life Ind. & Inv. Co.*, 61 Minn. 516, 52 A. S. R. 616; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52, 7 A. R. 410.

In case of death by violence, the presumption is against suicide. *Leman v. Manhattan L. Ins. Co.*, 46 La. Ann. 1189, 49 A. S. R. 348; *Ins. Co. v. Bennett*, 90 Tenn. 256, 25 A. S. R. 685.

<sup>604</sup> *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661; *Mfrs. A. I. Co. v. Dorgan*, 16 U. S. App. 290, 22 L. R. A. 620; *Carnes v. Iowa State T. M. Ass'n*, 106 Iowa, 281, 68 A. S. R. 306; *American Acc. Co. v. Reigart*, 94 Ky. 547, 42 A. S. R. 374.

As to sufficiency of evidence to show accidental death by drowning, see *Trew v. Ry. Pass. Assur. Co.*, 6 Hurl. & N. 839, 30 Law J. Exch. 317; *Reynolds v. Acc. Ins. Co.*, 22 Law T. (N. S.) 820, 18 Wkly. Rep. 1141; *Mfrs. A. I. Co. v. Dorgan*, 16 U. S. App. 290, 22 L. R. A. 620.

<sup>605</sup> *Carnes v. Iowa State T. M. Ass'n*, 106 Iowa, 281, 68 A. S. R. 306; *Smith v. Aetna L. Ins. Co.*, 115 Iowa, 217, 91 A. S. R. 153; *Anthony v. Mercantile M. A. Ass'n*, 162 Mass. 354, 44 A. S. R. 367; *Hess v. Pre-*

These presumptions are not conclusive, and evidence is accordingly admissible to rebut them.<sup>606</sup> In order to overcome, by circumstantial evidence, the presumption against death by suicide, the evidence must not only point to and be consistent with the theory of suicide, but also be of such character as to exclude with reasonable certainty any other cause of death.<sup>607</sup>

#### P. NEGLIGENCE.

§ 65. The presumption of innocence, broadly speaking, applies in cases where negligence is in issue. Ordinarily, negligence is not presumed. On the contrary, the natural presumption is that a man has exercised ordinary care. Accordingly, in an action for negligence, the plaintiff bears the burden of proof in the sense that he must convince the jury that the defendant did not use due care; and at the beginning of the trial the plaintiff bears the burden of proof in the additional sense that he must adduce evidence in support of his complaint.<sup>608</sup>

ferred *M. M. Acc. Ass'n*, 112 Mich. 196, 40 L. R. A. 444; *Meadows v. Pac. M. L. Ins. Co.*, 129 Mo. 76, 50 A. S. R. 427.

In case of death by violence, the presumption is against murder or suicide. *Ins. Co. v. Bennett*, 90 Tenn. 256, 25 A. S. R. 685. See, however, *Johns v. N. W. M. Relief Ass'n*, 90 Wis. 332.

In case of death by violence, the deceased is presumed to have exercised ordinary care. *Neill v. Travellers' Ins. Co.*, 7 Ont. App. 570; *Badenfeld v. Mass. M. A. Ass'n*, 154 Mass. 77; *Freeman v. Travelers' Ins. Co.*, 144 Mass. 572; *Meadows v. Pac. M. L. Ins. Co.*, 129 Mo. 76, 50 A. S. R. 427; *Cronkhite v. Travelers' Ins. Co.*, 75 Wis. 116, 17 A. S. R. 184.

<sup>606</sup> *Ins. Co. v. Bennett*, 90 Tenn. 256, 25 A. S. R. 685; *Johns v. N. W. M. Relief Ass'n*, 90 Wis. 332.

<sup>607</sup> *Leman v. Manhattan L. Ins. Co.*, 46 La. Ann. 1189, 49 A. S. R. 348; *Phillips v. La. E. L. Ins. Co.*, 26 La. Ann. 404, 21 A. R. 549.

<sup>608</sup> *Brady v. C. & G. W. R. Co.*, 114 Fed. 100, 57 L. R. A. 712, 716; *Birmingham U. R. Co. v. Hale*, 90 Ala. 8, 24 A. S. R. 748; *Cleveland, C., C. & St. L. R. Co. v. Huddleston*, 21 Ind. App. 621, 69 A. S. R. 385; *Sav. Bank v. Caperton*, 87 Ky. 306, 12 A. S. R. 488; *Clements v. La. Elec. Light Co.*, 44 La. Ann. 692, 32 A. S. R. 348; *Frech v. P., W.*



**§ 66. Res ipsa loquitur.**

The mere fact that a man's person or property is involved in an accident does not subject him to liability to others who suffer injury in consequence. To charge him, it must appear that he was guilty of some wrongful act or omission contributing to the accident. If, therefore, it is alleged that he was negligent, the burden of showing negligence rests on the plaintiff; and this burden the plaintiff does not discharge, and so entitle himself to a recovery, unless he shows the cause of the accident and connects the defendant with it, and shows that it occurred through the defendant's neglect to use due care.<sup>609</sup>

& B. R. Co., 39 Md. 574; *Catron v. Nichols*, 81 Mo. 80, 51 A. R. 222; *Searles v. Manhattan R. Co.*, 101 N. Y. 661; *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 19 A. S. R. 475; *Cleveland T. & V. R. Co. v. Marsh*, 63 Ohio St. 236, 52 L. R. A. 142; *Pawling v. Hoskins*, 132 Pa. 617, 19 A. S. R. 617; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 24 A. S. R. 625; *Chesapeake & O. R. Co. v. Lee*, 84 Va. 642; *Gibson v. Huntington*, 38 W. Va. 177, 45 A. S. R. 853; 6 *Current Law*, 771.

An administrator suing for death by wrongful act bears the burden of proof, the same as if the decedent had survived and sued for personal injuries. *Jones v. Mfg. & Inv. Co.*, 92 Me. 565, 69 A. S. R. 535; *State v. Housekeeper*, 70 Md. 162, 2 L. R. A. 587.

A client who sues his attorney for negligence bears the burden of proof. *Pennington Exrs. v. Yell*, 11 Ark. 212, 52 A. D. 262.

The burden of proof, in the sense of burden of persuading the jury of the existence of the facts on which the right of action depends, unlike the burden of adducing evidence, never shifts, but rests on the plaintiff throughout the trial. *Dowell v. Guthrie*, 99 Mo. 653, 17 A. S. R. 598. See §§ 2, 4(b), *supra*.

<sup>609</sup> *East Tenn., V. & G. R. Co. v. Stewart*, 81 Tenn. 432; *Downey v. Gemini Min. Co.*, 24 Utah, 431, 91 A. S. R. 798.

*Accumulation of gas.* *Curran v. Warren C. & M. Co.*, 36 N. Y. 153.

*Breaking apart of train.* *Murray v. D. & R. G. R. Co.*, 11 Colo. 124.

*Elevator accident.* *Lennon v. Rawitzer*, 57 Conn. 583; *Gibson v. International Trust Co.*, 177 Mass. 100, 52 L. R. A. 928; *Spees v. Boggs*, 193 Pa. 112, 52 L. R. A. 933.

*Explosion.* *Nitro-Glycerine Case*, 15 Wall. (U. S.) 524, 537.

*Falling object.* *Case v. C., R. I. & P. R. Co.*, 64 Iowa, 762; *Kendall*

If, however, the thing that causes the injury is under the exclusive control of the defendant or his servants, and the accident is of such a nature that it would not have happened in the ordinary course of events if the defendant had been in the exercise of due care, the mere fact of its occurrence gives rise to a presumption of negligence, and the burden of adducing evidence of exculpatory facts is cast on the defendant.<sup>610</sup> This principle is expressed in the phrase, "res ipsa loquitur," and it is constantly applied in negligence cases. The doctrine of some courts is that, excepting where a contractual relation exists between the parties, as in the case of carriers, for example,<sup>611</sup>

*v. Boston*, 118 Mass. 234, 19 A. R. 446; *Huey v. Gahlenbeck*, 121 Pa. 238, 6 A. S. R. 790.

*Fire*. *The Buckeye*, 7 Biss. 23, Fed. Cas. No. 2,084; *Weeks v. McNulty*, 101 Tenn. 495, 70 A. S. R. 693.

*Low-hanging telegraph wire*. *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 2 A. S. R. 193.

*Pin thrown by locomotive*. *Cleveland, C., C. & St. L. R. Co. v. Berry*, 152 Ind. 607, 46 L. R. A. 33.

*Poisonous food*. *Sheffer v. Willoughby*, 163 Ill. 518, 34 L. R. A. 464.

*Runaway*. *O'Brien v. Miller*, 60 Conn. 214, 25 A. S. R. 320; *Hart v. Wash. Park Club*, 157 Ill. 9, 48 A. S. R. 298; *Creamer v. McIlvain*, 89 Md. 343, 45 L. R. A. 531.

*Switching of street car against pedestrian*. *Donovan v. Hartford St. R. Co.*, 65 Conn. 201, 29 L. R. A. 297.

*Tunnel accident on mimic railroad*. *Benedick v. Potts*, 88 Md. 52, 41 L. R. A. 478.

<sup>610</sup> *Inland & S. Coasting Co. v. Tolson*, 139 U. S. 551; *St. Louis, I. M. & S. R. Co. v. Taylor*, 57 Ark. 136; *Hart v. Wash. Park Club*, 157 Ill. 9, 48 A. S. R. 298 (semble); *Mulcairns v. Janesville*, 67 Wis. 24; *Cummings v. Nat. Furnace Co.*, 60 Wis. 603; *Carroll v. C., B. & N. R. Co.*, 99 Wis. 399, 67 A. S. R. 872.

*Collision on highway*. *Riepe v. Elting*, 89 Iowa, 82, 48 A. S. R. 356; *Meyers v. Hinds*, 110 Mich. 300, 64 A. S. R. 345.

*Collision of vessels*. *Bigelow v. Nickerson*, 70 Fed. 113, 30 L. R. A. 336.

*Fire*. *Moore v. Parker*, 91 N. C. 275; *Shafer v. Lacock*, 168 Pa. 497, 29 L. R. A. 254. Fire set by locomotive, see page 274, *infra*.

<sup>611</sup> See § 69, *infra*.

negligence will not be presumed from the happening of the accident and a consequent injury, but the plaintiff must show either actual negligence or conditions which are so obviously dangerous as to admit of no inference other than that of negligence.<sup>612</sup> This view does not generally prevail, however, as may be seen by the following illustrations of the rule.

(a) **Electric wires.** Persons licensed to maintain overhead wires in public places for the transmission of electricity for power, illumination, or other purposes, are bound to use a high degree of care for the protection of the public; and if, by reason of imperfect insulation or derangement of the wires, any one is injured in person or in property through contact therewith, a presumption of negligence arises, which casts on the defendant the burden of showing that he exercised due care.<sup>613</sup>

<sup>612</sup> Nitro-Glycerine Case, 15 Wall. (U. S.) 524, 538 (semble); Louisville & N. R. Co. v. Allen's Adm'r, 78 Ala. 494 (semble); Howser v. C. & P. R. Co., 80 Md. 146, 151, 45 A. S. R. 332 (semble); Phila., W. & B. R. Co. v. Stebbing, 62 Md. 504; Cosulich v. Standard Oil Co., 122 N. Y. 118, 19 A. S. R. 475; Stearns v. Ontario Spinning Co., 184 Pa. 519, 63 A. S. R. 807. *Contra*, Rose v. Stephens & C. Transp. Co., 20 Blatchf. 411, 11 Fed. 438; Judson v. Giant Powder Co., 107 Cal. 549, 48 A. S. R. 146; Ill. Cent. R. Co. v. Phillips, 55 Ill. 195 (semble).

In Stearns v. Ontario Spinning Co., *supra*, it is said that the burden which is thrown upon the defendant in this latter event is not that of satisfactorily accounting for the accident, but merely that of showing that he used due care.

<sup>613</sup> Denver Consol. Elec. Co. v. Simpson, 21 Colo. 371, 31 L. R. A. 566; W. U. Tel. Co. v. State, 82 Md. 293, 51 A. S. R. 464; Brown v. Edison Elec. Illum. Co., 90 Md. 400, 46 L. R. A. 745; Gannon v. Laclede Gas Light Co., 145 Mo. 502, 43 L. R. A. 505; Newark Elec. L. & P. Co. v. Ruddy, 62 N. J. Law, 505, 63 N. J. Law, 357, 57 L. R. A. 624; Suburban Elec. Co. v. Nugent, 58 N. J. Law, 658, 32 L. R. A. 700; Mitchell v. Raleigh Elec. Co., 129 N. C. 166; Haynes v. Raleigh Gas Co., 114 N. C. 203, 41 A. S. R. 786; Boyd v. Portland Gen. Elec. Co., 40 Or. 126, 57 L. R. A. 619; Elec. R. Co. v. Shelton, 89 Tenn. 423, 24 A. S. R. 614; Snyder v. Wheeling Elec. Co., 43 W. Va. 661, 64 A. S. R. 922. And see Clements v. La. Elec. Light Co., 44 La. Ann. 692, 32 A. S. R. 348.

(b) **Falling objects.** If a person lawfully on a highway or passageway is injured by the falling of an object from an adjacent building or structure of any sort, the circumstances of the accident give rise to a presumption of negligence on the part of the person in immediate charge either in person or by agent.<sup>614</sup>

*Escape of electricity from car rails.* Trenton Pass. R. Co. v. Cooper, 60 N. J. Law, 219, 38 L. R. A. 637.

<sup>614</sup> Kearney v. L. B. & S. C. R. Co., L. R. 5 Q. B. 411; Scott v. London Dock Co., 34 Law J. Exch. 220, 3 Hurl. & C. 596; Byrne v. Boadle, 2 Hurl. & C. 722; St. Louis, I. M. & S. R. Co. v. Hopkins, 54 Ark. 209, 12 L. R. A. 189; Dixon v. Pluns, 98 Cal. 384, 35 A. S. R. 180; Barnowski v. Helson, 89 Mich. 523, 15 L. R. A. 33; Kaples v. Orth, 61 Wis. 531. See, however, Kendall v. Boston, 118 Mass. 234, 19 A. R. 446; Stearns v. Ontario Spinning Co., 184 Pa. 519, 63 A. S. R. 807.

*Fall of timber from flat car.* Howser v. C. & P. R. Co., 80 Md. 146, 45 A. S. R. 332.

*Fall of freight-car door.* St. Louis, I. M. & S. R. Co. v. Neely, 63 Ark. 636, 37 L. R. A. 616. *Contra*, Case v. C., R. I. & P. R. Co., 64 Iowa, 762.

*Fall of keg on shipboard.* Watts v. Jensen, 56 U. S. App. 619, 86 Fed. 658, 46 L. R. A. 58.

*Fall of electric or elevated railroad fixture.* Uggla v. West End St. R. Co., 160 Mass. 351, 39 A. S. R. 481; Volkmar v. Manhattan R. Co., 134 N. Y. 418, 30 A. S. R. 678.

*Fall of car window.* Carroll v. C., B. & N. R. Co., 99 Wis. 399, 67 A. S. R. 872.

*Fall of cistern wall.* Mulcairns v. Janesville, 67 Wis. 24.

The presumption arises, also, against the owner of a ruinous building, a part of which falls on a person on the adjacent highway. Ryder v. Kinsey, 62 Minn. 85, 34 L. R. A. 557; Mullen v. St. John, 57 N. Y. 567, 15 A. R. 530.

The fact that a customer in a warehouse is injured by a falling object does not raise a presumption of negligence on the part of the warehouseman unless the object is identified as having been within his control, or he is in some way connected with the accident. Huey v. Gahlenbeck, 121 Pa. 238, 6 A. S. R. 790, limiting Lake Shore & M. S. R. Co. v. Rosenzweig, 113 Pa. 519.

If a building from which a brick falls is in the hands of several independent contractors, whose employes are at work thereon at the same time, the burden of showing that the employe of any particular

(c) **Explosions.** In some states an explosion itself furnishes prima facie evidence of negligence on the part of the person in charge either in person or by agent, which he must accordingly rebut in order to relieve himself from liability.<sup>615</sup>

(d) **Railroad accidents.** The fact that a traveler on the highway is killed or injured at a railroad crossing does not give rise to a presumption of negligence on the part of the company operating the train; and, in an action for the death or the injuries, the burden of showing negligence rests, therefore, on the plaintiff.<sup>616</sup>

contractor caused the brick to fall rests on the plaintiff, in an action for personal injuries. *Wolf v. Downey*, 164 N. Y. 30, 51 L. R. A. 241.

<sup>615</sup> *Boiler.* *Rose v. Stephens & C. Transp. Co.*, 20 Blatchf. 411, 11 Fed. 438; *Grimsley v. Hankins*, 46 Fed. 400; *Ill. Cent. R. Co. v. Phillips*, 55 Ill. 194; *Fay v. Davidson*, 13 Minn. 523; *Beall v. Seattle*, 28 Wash. 593, 61 L. R. A. 583. See *Ill. Cent. R. Co. v. Houck*, 72 Ill. 285. *Contra*, *Huff v. Austin*, 46 Ohio St. 386, 15 A. S. R. 613; *Young v. Bransford*, 12 Lea (Tenn.) 232; *Veith v. Salt Co.*, 51 W. Va. 96, 57 L. R. A. 410. And see *Louisville & N. R. Co. v. Allen's Adm'r*, 78 Ala. 494.

*Dynamite, gunpowder or nitroglycerine.* *Judson v. Giant Powder Co.*, 107 Cal. 549, 48 A. S. R. 146. *Contra*, *Nitro-Glycerine Case*, 15 Wall. (U. S.) 524; *Kinney v. Koopman*, 116 Ala. 310, 67 A. S. R. 119; *Walker v. C., R. I. & P. R. Co.*, 71 Iowa, 658.

In New York it has been held that no presumption of negligence arises from the explosion of an oil tank. *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, 19 A. S. R. 475.

Presumption of negligence arising against carriers of passengers from explosion, see note 670, *infra*.

<sup>616</sup> *Wakelin v. L. & S. W. R. Co.*, 12 App. Cas. 41; *Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 18 A. S. R. 303; *Cent. Pass. R. Co. v. Kuhn*, 86 Ky. 578, 9 A. S. R. 309; *Deikman v. Morgan's L. & T. R. & S. S. Co.*, 40 La. Ann. 787; *Murray v. Mo. Pac. R. Co.*, 101 Mo. 236, 20 A. S. R. 601; *Pa. R. Co. v. Middleton*, 57 N. J. Law, 154, 51 A. S. R. 597; *Phila. & R. R. Co. v. Boyer*, 97 Pa. 91. And see *State v. Phila., W. & B. R. Co.*, 60 Md. 555; *Phila., W. & B. R. Co. v. Stebbing*, 62 Md. 504; *Annapolis & B. S. L. R. Co. v. Pumphrey*, 72 Md. 82; *Yarnell v. Kan. City, Ft. S. & M. R. Co.*, 113 Mo. 570, 18 L. R. A. 599.

The same is true where a train kills or injures a trespasser on the track. The burden of proof rests on the plaintiff. *Price v. Phila., W. & B. R. Co.*, 84 Md. 506, 36 L. R. A. 213; *Herring v. W. & R. R. Co.*,

As to whether, in an action against a railroad company for killing or injuring live stock on the track, the plaintiff makes a prima facie case of negligence on the part of the defendant by showing the accident, and thereby shifts the burden of adducing evidence of due care to the defendant, the cases are in conflict. In many cases it is held that the place and circumstance of the accident may found a presumption of negligence on the part of the company,<sup>617</sup> while in other cases the same or different facts are deemed insufficient for that purpose.<sup>618</sup>

32 N. C. (10 Ired.) 402; Ward v. Southern Pac. Co., 25 Or. 433, 23 L. R. A. 715.

It is provided otherwise by statute in some states. Southwestern R. Co. v. Singleton, 67 Ga. 306; Vicksburg & M. R. Co. v. Phillips, 64 Miss. 693.

A presumption of negligence arises from the blowing of a locomotive whistle loudly and repeatedly as it passes under a public bridge. Mitchell v. N., C. & St. L. R. Co., 100 Tenn. 329, 40 L. R. A. 426.

<sup>617</sup> East Tenn., V. & G. R. Co. v. Bayliss, 74 Ala. 150; Little Rock & F. S. R. Co. v. Finley, 37 Ark. 562; Little Rock & F. S. R. Co. v. Jones, 41 Ark. 157; McCoy v. Cal. Pac. R. Co., 40 Cal. 532, 6 A. R. 623; Woolfolk v. Macon & A. R. Co., 56 Ga. 457; Savannah, F. & W. R. v. Gray, 77 Ga. 440 (semble); Union Pac. R. Co. v. High, 14 Neb. 14; Walsh v. Va. & T. R. Co., 8 Nev. 110; White v. Concord R., 30 N. H. 188; Smith v. Eastern R., 35 N. H. 356; Mack v. S. B. R. Co., 52 S. C. 323, 68 A. S. R. 913; Jones v. C. & G. R. Co., 20 S. C. 249; Murray v. S. C. R. Co., 10 Rich. Law (S. C.) 227, 70 A. D. 219; Danner v. S. C. R. Co., 4 Rich. Law (S. C.) 329, 55 A. D. 678; International & G. N. R. Co. v. Cocke, 64 Tex. 151.

<sup>618</sup> Savannah, F. & W. R. Co. v. Gelger, 21 Fla. 669, 58 A. R. 697; Chicago & M. R. Co. v. Patchin, 16 Ill. 198, 61 A. D. 65; Indianapolis & C. R. Co. v. Means, 14 Ind. 30; Schneir v. C., R. I. & P. R. Co., 40 Iowa, 337; Locke v. First Div. of St. P. & P. R. Co., 15 Minn. 350; Mobile & O. R. Co. v. Hudson, 50 Miss. 572; Brown v. H. & St. J. R. Co., 33 Mo. 309; Walsh v. Va. & T. R. Co., 8 Nev. 110; Scott v. W. & R. R. Co., 49 N. C. (4 Jones) 432; Horne v. M. & O. R. Co., 1 Cold. (Tenn.) 74; International & G. N. R. Co. v. Cocke, 64 Tex. 151; Bethje v. H. & C. T. R. Co., 26 Tex. 604; Lyndsay v. Conn. & P. R. R. Co., 27 Vt. 643; Orange, A. & M. R. Co. v. Miles, 76 Va. 773; Galpin v. C. & N. W. R. Co., 19 Wis. 604.

Hammon, Ev.—18.

The conflict of authority results, for the most part, from differences in the statutory regulations prevailing in the various states concerning the duty of railroad companies to fence their tracks.

In an action against a railroad company for negligence in setting a fire by sparks from a locomotive, the burden of proof rests on the plaintiff, and he must accordingly show that the fire was set through the defendant's negligence, and that he suffered damage in consequence.<sup>619</sup> If he adduces evidence tending to show that the fire was caused by sparks from a locomotive, however, a presumption of negligence arises. He thereby makes a *prima facie* case against the defendant, which shifts upon it the burden of adducing evidence tending to show that the engine in question was properly constructed, equipped, and operated.<sup>620</sup> When the defendant has done this,

<sup>619</sup> *Louisville & N. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 50 L. R. A. 620, 624; *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 27 Fla. 1, 157, 17 L. R. A. 33, 65; *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354, 15 A. R. 362, 365; *Laird v. Railroad*, 62 N. H. 254, 13 A. S. R. 564, 568 (semble); *Fleld v. N. Y. Cent. R.*, 32 N. Y. 339, 345 (semble); *Henderson v. Phila. & R. R. Co.*, 144 Pa. 461, 27 A. S. R. 652; *Atkinson v. Goodrich Transp. Co.*, 69 Wis. 5.

If it appears that a locomotive emitted sparks at about the time of the fire in question, and there is no other cause or circumstance of suspicion concerning the origin of the fire, it rests on the company to show that the locomotive did not set the fire. *Longabaugh v. Va. City & T. R. Co.*, 9 Nev. 271.

<sup>620</sup> ENGLAND: *Piggot v. E. C. R. Co.*, 3 C. B. 229, 3 Man., G. & S. 229, 54 E. C. L. 228.

UNITED STATES: *McCullen v. C. & N. W. R. Co.*, 101 Fed. 66, 49 L. R. A. 642; *Eddy v. Lafayette*, 49 Fed. 807.

ALABAMA: *Louisville & N. R. Co. v. Reese*, 85 Ala. 497, 7 A. S. R. 66; *Louisville & N. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 50 L. R. A. 620.

ILLINOIS: *Bass v. C., B. & Q. R. Co.*, 28 Ill. 9, 81 A. D. 254; *Pittsburgh, C. & St. L. R. Co. v. Campbell*, 86 Ill. 443; *Ill. Cent. R. Co. v. Mills*, 42 Ill. 407.

MINNESOTA: *Woodson v. M. & St. P. R. Co.*, 21 Minn. 60.

it thereby makes a prima facie case against the plaintiff, and he cannot recover unless negligence in other respects is shown.<sup>921</sup>

MISSOURI: Coates v. Mo., K. & T. R. Co., 61 Mo. 38; Clemens v. H. & St. J. R. Co., 53 Mo. 366, 14 A. R. 460; Wise v. Joplin R. Co., 85 Mo. 178.

NEBRASKA: Burlington & M. R. Co. v. Westover, 4 Neb. 268; Union Pac. R. Co. v. Keller, 36 Neb. 189.

OREGON: Koontz v. O. R. & N. Co., 20 Or. 3.

SOUTH DAKOTA: White v. C., M. & St. P. R. Co., 1 S. D. 326, 9 L. R. A. 824.

TENNESSEE: Burke v. L. & N. R. Co., 7 Heisk. 451, 19 A. R. 618.

TEXAS: Gulf, C. & S. F. R. Co. v. Benson, 69 Tex. 407, 5 A. S. R. 74; Galveston, H. & S. A. R. Co. v. Horne, 69 Tex. 643.

UTAH: Anderson v. W. & J. V. R. Co., 2 Utah, 518.

VERMONT: Cleaveland v. G. T. R. Co., 42 Vt. 449.

WISCONSIN: Spaulding v. C. & N. W. R. Co., 30 Wis. 110, 11 A. R. 550 (semble).

And see Union Pac. R. Co. v. De Busk, 12 Colo. 294, 13 A. S. R. 221, 225.

*Contra,*

UNITED STATES: Garrett v. So. R. Co., 101 Fed. 102, 49 L. R. A. 646.

DELAWARE: Jefferis v. Phila., W. & B. R. Co., 3 Houst. 447.

INDIANA: Indianapolis & C. R. Co. v. Paramore, 31 Ind. 143.

IOWA: Gandy v. C. & N. W. R. Co., 30 Iowa, 420.

NEW YORK: Field v. N. Y. Cent. R., 32 N. Y. 339, 349 (semble).

OHIO: Ruffner v. C., H. & D. R. Co., 34 Ohio St. 96.

PENNSYLVANIA: Henderson v. Phila. & R. R. Co., 144 Pa. 461, 27 A. S. R. 652.

VIRGINIA: Bernard v. R., F. & P. R. Co., 85 Va. 792, 17 A. S. R. 103.

And see Montgomery v. Muskegon B. Co., 88 Mich. 633, 26 A. S. R. 308; Atkinson v. Goodrich Transp. Co., 69 Wis. 5.

The matter is governed by statute in some states. Small v. C., R. I. & P. R. Co., 50 Iowa, 338; Green Ridge R. Co. v. Brinkman, 64 Md. 52, 54 A. R. 755; Bowen v. St. P., M. & M. R. Co., 36 Minn. 522, 523; Louisville, N. O. & T. R. Co. v. N., J. & C. R. Co., 67 Miss. 399.

Evidence that the fire was communicated by sparks from the defendant's engine, if accompanied by evidence that an engine, properly constructed and managed, does not occasion fires, makes a prima facie case of negligence against the defendant. Judson v. Giant Powder Co., 107 Cal. 549, 560, 48 A. S. R. 146, 153 (semble); Atchison, T. & S. F. R. Co. v. Stanford, 12 Kan. 354, 15 A. R. 362; Field v. N. Y. Cent. R., 32 N. Y. 339.



Railroad accidents resulting in injury to passengers or in their death oftentimes give rise to a presumption of negligence on the part of the carrier, as may be seen in another connection.<sup>622</sup>

(e) **Master and servant.** Accidents may occur in the course of a man's employment which of themselves give rise to a presumption of negligence on the part of the employer,<sup>623</sup> subject, however, to rules of law otherwise limiting the master's liability;<sup>624</sup> as where, for instance, the servant had assumed the risk of the accident,<sup>625</sup> or the accident was due to the negligence of a fellow servant.<sup>626</sup>

(f) **Rebuttal of presumption.** The presumption of negligence arising from the happening of an accident is not conclusive, and evidence is accordingly admissible to rebut it.<sup>627</sup>

The emission of sparks of unusual size or in unusual quantities may raise the presumption of negligence. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 27 Fla. 1, 157, 17 L. R. A. 33, 65.

<sup>622</sup> *Louisville & N. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 50 L. R. A. 620, 624; *Meyer v. V., S. & P. R. Co.*, 41 La. Ann. 639, 17 A. S. R. 408; *Coates v. Mo., K. & T. R. Co.*, 61 Mo. 38; *Babcock v. F. R. Co.*, 140 N. Y. 308 (semble); *Koontz v. O. R. & N. Co.*, 20 Or. 3; *Gulf, H. & S. A. R. Co. v. Benson*, 69 Tex. 407, 5 A. S. R. 74; *Menominee River S. & D. Co. v. M. & N. R. Co.*, 91 Wis. 447.

<sup>623</sup> Section 69, *infra*.

<sup>624</sup> *Watts v. Jensen*, 56 U. S. App. 619, 86 Fed. 658, 46 L. R. A. 58; *Grimsley v. Hankins*, 46 Fed. 400; *Griffin v. B. & A. R. Co.*, 148 Mass. 143, 1 L. R. A. 698; *Tex. & N. O. R. Co. v. Crowder*, 63 Tex. 502, 504 (semble).

<sup>625</sup> *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 2 A. S. R. 193.

<sup>626</sup> *Minty v. Union Pac. R. Co.*, 2 Idaho, 437, 4 L. R. A. 409; *Nason v. West*, 78 Me. 253; *Wormell v. Me. Cent. R. Co.*, 79 Me. 397, 1 A. S. R. 321; *McIsaac v. Northampton E. L. Co.*, 172 Mass. 89, 70 A. S. R. 244; *Erie & W. V. R. Co. v. Smith*, 125 Pa. 259, 11 A. S. R. 895.

<sup>627</sup> *Murray v. D. & R. G. R. Co.*, 11 Colo. 124; *Thyng v. Fitchburg R. Co.*, 156 Mass. 13, 32 A. S. R. 425; *Brennan v. Gordon*, 3 N. Y. State Rep. 604.

<sup>628</sup> *Grimsley v. Hankins*, 46 Fed. 400; *Judson v. Giant Powder Co.*, 107 Cal. 549, 555, 48 A. S. R. 146, 149; *Lennon v. Rawitzer*, 57 Conn.

And it does not arise if, in proving the accident, additional facts appear which exonerate the defendant from blame.<sup>628</sup>

### § 67. Contributory negligence.

In an action for negligence, as has been seen, the plaintiff, at the beginning of the trial, is obliged to adduce evidence tending to sustain his allegations.<sup>629</sup> When he has introduced evidence tending to show negligence on the part of the defendant, this burden of adduction is discharged, by the better opinion, and, if the defendant offers nothing, the plaintiff is entitled to go to the jury. Unless his evidence shows him guilty of contributory negligence, he is not bound to show affirmatively, as part of his case, a want of negligence on his own part.<sup>630</sup> This rule is applied in actions for death or injuries caused by the failure to guard dangerous premises,<sup>631</sup> or by

583; *Toledo, W. & W. R. Co. v. Larmon*, 67 Ill. 68; *Riepe v. Elting*, 89 Iowa, 82, 48 A. S. R. 356; *Uggle v. West End St. R. Co.*, 160 Mass. 351, 39 A. S. R. 481; *Snyder v. Wheeling Elec. Co.*, 43 W. Va. 661, 64 A. S. R. 922.

<sup>628</sup> *Gibson v. International Trust Co.*, 177 Mass. 100, 52 L. R. A. 928; *Ryder v. Kinsey*, 62 Minn. 85, 34 L. R. A. 557; *Dowell v. Guthrie*, 99 Mo. 653, 17 A. S. R. 598; *Stearns v. Ontario Spinning Co.*, 184 Pa. 519, 63 A. S. R. 807; 6 Current Law, 773.

<sup>629</sup> See § 65, *supra*.

<sup>630</sup> *Inland & S. C. Co. v. Tolson*, 139 U. S. 551; *Tex. & P. R. Co. v. Volk*, 151 U. S. 73; *Ala. G. S. R. Co. v. Frazier*, 93 Ala. 45, 30 A. S. R. 28; *Frech v. Phila., W. & B. R. Co.*, 39 Md. 574; *Hocum v. Weitherick*, 22 Minn. 152; *Durrell v. Johnson*, 31 Neb. 796, 801; *Suburban Elec. Co. v. Nugent*, 58 N. J. Law, 658, 32 L. R. A. 700; *Cable v. So. R. Co.*, 122 N. C. 892 (statute); *Baker v. Westmoreland & C. N. G. Co.*, 157 Pa. 593.

If, in an action on an accident insurance policy, it appears that the deceased came to his death by violence, the presumption is that he exercised ordinary care to avoid it. Note 605, *supra*.

Aggravation of personal injuries through negligence of the plaintiff, if urged in reduction of damages, must be proved by the defendant. *Goshen v. England*, 119 Ind. 368.

<sup>631</sup> *Sanders v. Reister*, 1 Dak. 151; *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 219, 39 A. R. 503.

defects in sidewalks, streets, or bridges;<sup>632</sup> actions by passenger against carrier;<sup>633</sup> actions against railroad or street-car companies for damage done to person or property on the highway;<sup>634</sup> actions against railroad companies for setting fire by sparks from locomotives;<sup>635</sup> and actions against masters for the death of or injuries to servants.<sup>636</sup> In these cases, therefore,

<sup>632</sup> *Watertown v. Greaves*, 50 C. C. A. 172, 112 Fed. 183, 56 L. R. A. 865; *St. Paul v. Kuby*, 8 Minn. 154; *Mitchell v. Clinton*, 99 Mo. 153; *Omaha v. Ayer*, 32 Neb. 375, 386; *Ouerson v. Grafton*, 5 N. D. 281; *Hays v. Gallagher*, 72 Pa. 136; *Stewart v. Nashville*, 96 Tenn. 50; *Gordon v. Richmond*, 83 Va. 436; *Welsh v. Argyle*, 85 Wis. 307, 311; *Seymer v. Lake*, 66 Wis. 651, 656; *Prideaux v. Mineral Point*, 43 Wis. 513, 28 A. R. 558; *Hoyt v. Hudson*, 41 Wis. 105, 22 A. R. 714; *Achtenhagen v. Watertown*, 18 Wis. 331, 86 A. D. 769.

<sup>633</sup> *Wash. & G. R. Co. v. Harmon's Adm'r*, 147 U. S. 571, 580; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291; *McQuilken v. Cent. Pac. R. Co.*, 50 Cal. 7; *Thompson v. N. M. R. Co.*, 51 Mo. 190, 11 A. R. 443; *Wallace v. W. N. C. R. Co.*, 104 N. C. 442 (statute); *Dallas & W. R. Co. v. Spicker*, 61 Tex. 427 (semble); *Mo. Pac. R. Co. v. Foreman*, 73 Tex. 311, 15 A. S. R. 785 (semble); *Waterman v. C. & A. R. Co.*, 82 Wis. 613.

<sup>634</sup> *Wash. & G. R. Co. v. Gladmon*, 15 Wall. (U. S.) 401; *Southern Pac. Co. v. Tomlinson (Ariz.)* 33 Pac. 710; *Robinson v. W. P. R. Co.*, 48 Cal. 409; *Baltimore Traction Co. v. Appel*, 80 Md. 603, 604, 609; *Mynning v. D., L. & N. R. Co.*, 64 Mich. 93, 102, 8 A. S. R. 804 (semble); *Lillstrom v. N. P. R. Co.*, 53 Minn. 464, 20 L. R. A. 587, 590; *O'Connor v. Mo. Pac. R. Co.*, 94 Mo. 150, 4 A. S. R. 364; *Murray v. Mo. Pac. R. Co.*, 101 Mo. 236, 20 A. S. R. 601; *Weller v. C., M. & St. P. R. Co.*, 164 Mo. 180, 86 A. S. R. 592; *Hudson v. W. W. R. Co.*, 101 Mo. 13; *Pa. R. Co. v. Middleton*, 57 N. J. Law, 154, 51 A. S. R. 597; *Johnson v. H. R. R. Co.*, 20 N. Y. 65, 75 A. D. 375 (semble); *McBride v. N. P. R. Co.*, 19 Or. 64 (semble); *Pa. R. Co. v. Weber*, 76 Pa. 157, 18 A. R. 407; *Weiss v. Pa. R. Co.*, 79 Pa. 387; *Longenecker v. Pa. R. Co.*, 105 Pa. 328, 331; *Cleveland & P. R. Co. v. Rowan*, 66 Pa. 393; *Bradwell v. P. & W. E. Pass. R. Co.*, 139 Pa. 404; *Gulf, C. & S. F. R. Co. v. Shieder*, 88 Tex. 152, 28 L. R. A. 538; *Phillips v. M. & N. R. Co.*, 77 Wis. 349, 9 L. R. A. 521.

<sup>635</sup> *Louisville, N. O. & T. R. Co. v. N., J. & C. R. Co.*, 67 Miss. 399; *Snyder v. P., C. & St. L. R. Co.*, 11 W. Va. 14.

<sup>636</sup> *Chicago G. W. R. Co. v. Price*, 97 Fed. 423; *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 13 A. S. R. 84; *Ga. Pac. R. Co. v. Davis*, 92 Ala.

by the weight of authority, contributory negligence is an affirmative defense to be proved by the defendant.

In some states, however, a contrary view is taken, and a plaintiff who sues for negligence is required to adduce evidence tending to show, not only that the defendant was guilty of negligence, but that he himself was free from it.<sup>637</sup> This

- 300, 25 A. S. R. 47; *Holt v. Whatley*, 51 Ala. 569; *Little Rock, M. R. & T. R. Co. v. Leverett*, 48 Ark. 333, 3 A. S. R. 230; *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 460, 3 A. S. R. 245; *Cent. R. & B. Co. v. Kenney*, 58 Ga. 485; *Cent. R. & B. Co. v. Small*, 80 Ga. 519, 523; *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412; *Bogenschutz v. Smith*, 84 Ky. 330; *Thyng v. F. R. Co.*, 156 Mass. 13, 32 A. S. R. 425 (semble); *Rolseth v. Smith*, 38 Minn. 14, 8 A. S. R. 637; *Young v. Shickle, H. & H. Iron Co.*, 103 Mo. 324; *Flynn v. Kan. City, St. J. & C. B. R. Co.*, 78 Mo. 195; *Prosser v. Mont. C. R. Co.*, 17 Mont. 372, 30 L. R. A. 814; *Union S. Y. Co. v. Conoyer*, 41 Neb. 617; *Owens v. R. & D. R. Co.*, 88 N. C. 502, 507 (semble); *Brown v. Sullivan*, 71 Tex. 470; *San Antonio & A. Pass. R. Co. v. Bennett*, 76 Tex. 151; *Northern Pac. R. Co. v. O'Brien*, 1 Wash. St. 599; *Comer v. Consol. C. & M. Co.*, 34 W. Va. 533; *Flannegan v. C. & O. R. Co.*, 40 W. Va. 436, 52 A. S. R. 896.

A servant suing the master for negligence is not bound to show, in the first instance, a want of negligence on the part of a fellow servant. *Lorimer v. St. P. City R. Co.*, 48 Minn. 391; *Flannegan v. C. & O. R. Co.*, 40 W. Va. 436, 52 A. S. R. 896; *Dugan v. C., St. P., M. & O. R. Co.*, 85 Wis. 609.

<sup>637</sup> *North Chicago St. R. Co. v. Louis*, 138 Ill. 9; *Lucas v. N. B. & T. R. Co.*, 6 Gray (Mass.) 64, 66 A. D. 406; *Lee v. Troy Citizens' Gas Light Co.*, 98 N. Y. 115.

The rule in these states is sometimes stated in the qualified form that, where the action of both parties must have concurred to produce the injury, it devolves upon the plaintiff to show that he was not himself guilty of contributory negligence. *Clements v. La. Elec. Light Co.*, 44 La. Ann. 692, 32 A. S. R. 348; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Bovee v. Danville*, 53 Vt. 183. And it seems to be the rule in some states that the burden of proof rests on the plaintiff as to contributory negligence, but that the burden of adducing evidence of due care on his part is satisfied if he shows negligence on the part of the defendant under circumstances which cast no imputation of blame on the plaintiff. *Mayo v. B. & M. R.*, 104 Mass. 137; *Thyng v. F. R. Co.*, 156 Mass. 13, 32 A. S. R. 425; *Teipel v. Hilsendegen*,

view is taken in actions for death or injuries caused by defects in sidewalks, streets, or bridges;<sup>638</sup> actions against railroad or street-car companies for damage done to person or property on the highway;<sup>639</sup> actions against masters for death of or injuries to servants;<sup>640</sup> and actions for collision between vehicles or vehicles and pedestrians.<sup>641</sup> In some jurisdictions, therefore, the plaintiff must in these cases show an absence of contributory negligence as part of his affirmative case.

Whichever may be the better rule, it is undoubtedly the law

44 Mich. 461; *Guggenheim v. L. S. & M. S. R. Co.*, 66 Mich. 150, 159; *Mynning v. D., L. & N. R. Co.*, 64 Mich. 93, 8 A. S. R. 804; *Lyman v. B. & M. R. Co.*, 66 N. H. 200, 11 L. R. A. 364; *Button v. H. R. R. Co.*, 18 N. Y. 248; *Johnson v. H. R. R. Co.*, 20 N. Y. 65, 75 A. D. 375.

<sup>638</sup> *Bartram v. Sharon*, 71 Conn. 686, 71 A. S. R. 225; *Fox v. Glastenbury*, 29 Conn. 204 (semble); *Kepperly v. Ramsden*, 83 Ill. 354; *Toledo, W. & W. R. Co. v. Brannagan*, 75 Ind. 490; *Crafts v. Boston*, 109 Mass. 519; *Murphy v. Deane*, 101 Mass. 455, 3 A. R. 390; *Vicksburg v. Hennessy*, 54 Miss. 391, 28 A. R. 354, 356 (semble); *Bovee v. Danville*, 53 Vt. 183.

<sup>639</sup> *Ind. B. & W. R. Co. v. Greene*, 106 Ind. 279, 55 A. R. 736; *Cincinnati, I., St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 19 A. S. R. 96; *Cincinnati, H. & I. R. Co. v. Butler*, 103 Ind. 31; *Evansville St. R. Co. v. Gentry*, 147 Ind. 408, 62 A. S. R. 421; *Benton v. Cent. R.*, 42 Iowa, 192 (semble); *Lesan v. Me. Cent. R. Co.*, 77 Me. 85; *Gaynor v. O. C. & N. R. Co.*, 100 Mass. 208, 97 A. D. 96 (semble); *Gahagan v. B. & L. R. Co.*, 1 Allen (Mass.) 187, 79 A. D. 724; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99; *Brickell v. N. Y. Cent. & H. R. R. Co.*, 120 N. Y. 290, 17 A. S. R. 648; *Wilcox v. R., W. & O. R. Co.*, 39 N. Y. 358, 100 A. D. 440; *Coughtry v. Willamette St. R. Co.*, 21 Or. 245 (semble).

Indictment for death, see *State v. Me. Cent. R. Co.*, 76 Me. 357, 49 A. R. 622. Trespasser on track, see *Blanchard v. L. S. & M. S. R. Co.*, 126 Ill. 416, 9 A. S. R. 630.

<sup>640</sup> *Ill. Cent. R. Co. v. Houck*, 72 Ill. 285; *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 10 A. S. R. 67, 72; *Hawes v. B., C. R. & N. R. Co.*, 64 Iowa, 315; *Wormell v. Me. Cent. R. Co.*, 79 Me. 397, 1 A. S. R. 321; *McLane v. Perkins*, 92 Me. 39, 43 L. R. A. 487; *Corcoran v. B. & A. R. Co.*, 133 Mass. 507.

<sup>641</sup> *Lane v. Crombie*, 12 Pick. (Mass.) 176; *Parker v. Adams*, 12 Metc. (Mass.) 415, 46 A. D. 694; *Daniels v. Clegg*, 28 Mich. 32.

that, if the plaintiff's own evidence shows him *prima facie* to have been guilty of contributory negligence, he rests under the necessity of showing, not only negligence on the part of the defendant, but want of negligence on his own part. He must dispel the *prima facie* case which his own evidence makes against him, else suffer a dismissal or nonsuit.<sup>642</sup> If, however, the plaintiff's own evidence does not thus make a *prima facie*

<sup>642</sup> ENGLAND: *Davey v. L. & S. W. R. Co.*, 12 Q. B. Div. 70.

ALABAMA: *North Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247, 18 A. S. R. 105; *Holt v. Whatley*, 51 Ala. 569, 570.

CALIFORNIA: *Robinson v. W. P. R. Co.*, 48 Cal. 409; *McQuilken v. Cent. Pac. R. Co.*, 50 Cal. 7.

GEORGIA: *Cent. R. & B. Co. v. Kenney*, 53 Ga. 485.

ILLINOIS: *Blanchard v. L. S. & M. S. R. Co.*, 126 Ill. 416, 9 A. S. R. 630.

INDIANA: *Cincinnati, I., St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 19 A. S. R. 96; *Engler v. O. & M. R. Co.*, 142 Ind. 618.

LOUISIANA: *Ryan v. L., N. O. & T. R. Co.*, 44 La. Ann. 806.

MAINE: *State v. Me. Cent. R. Co.*, 76 Me. 357, 49 A. R. 622.

MARYLAND: *Phila., W. & B. R. Co. v. Stebbing*, 62 Md. 504, 49 A. R. 628, note.

MASSACHUSETTS: *Gahagan v. B. & L. R. Co.*, 1 Allen, 187, 79 A. D. 724.

MINNESOTA: *Brown v. M. & St. P. R. Co.*, 22 Minn. 165; *Hocum v. Weltherick*, 22 Minn. 152.

MISSOURI: *Hudson v. W. W. R. Co.*, 101 Mo. 13.

NEBRASKA: *Durrell v. Johnson*, 31 Neb. 796.

NEW YORK: *Tolman v. S., B. & N. Y. R. Co.*, 98 N. Y. 198, 50 A. R. 649; *Brickell v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 290, 17 A. S. R. 648; *Wendell v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 420.

NORTH CAROLINA: *Owens v. R. & D. R. Co.*, 88 N. C. 502, 507 (semble); *Wallace v. W. N. C. R. Co.*, 104 N. C. 442 (semble).

OREGON: *Coughtry v. Willamette St. R. Co.*, 21 Or. 245.

PENNSYLVANIA: *Cleveland & P. R. Co. v. Rowan*, 66 Pa. 393; *Baker v. W. & C. N. G. Co.*, 157 Pa. 593; *Schum v. Pa. R. Co.*, 107 Pa. 8, 52 A. R. 468.

TENNESSEE: *Stewart v. Nashville*, 96 Tenn. 50; *Bamberger v. Citizens' St. R. Co.*, 95 Tenn. 18, 49 A. S. R. 909.

TEXAS: *Gulf, C. & S. F. R. Co. v. Shieder*, 88 Tex. 152, 28 L. R. A. 538; *Brown v. Sullivan*, 71 Tex. 470; *San Antonio & A. Pass. R. Co. v.*

case against him, and yet tends to show contributory negligence, then the burden of adducing evidence of due care on his part is not shifted to him, and he will not be nonsuited because he fails to go forward with more evidence on that point, but upon such evidence the question of contributory negligence is for the jury.<sup>643</sup>

§ 68. Bailments.

(a) **Bailees in general.** In an action by a bailor of goods against the bailee, the burden of proof rests on the plaintiff in the sense that he must convince the jury of the existence of the facts on which his right of action depends; and incidentally he bears at the beginning of the trial the burden of proof in the additional sense that he must adduce evidence tending directly or indirectly to support his allegations.<sup>644</sup> By introducing evidence tending to show a default in delivering the goods on demand at a proper time, together with a failure to

Bennett, 76 Tex. 151; *Mo. Pac. R. Co. v. Foreman*, 73 Tex. 311, 15 A. S. R. 785.

WEST VIRGINIA: *Barrickman v. Marion Oil Co.*, 45 W. Va. 634, 44 L. R. A. 92, 100.

WISCONSIN: *Waterman v. C. & A. R. Co.*, 82 Wis. 613; *Prideaux v. Mineral Point*, 43 Wis. 513, 28 A. R. 558; *Achterhagen v. Watertown*, 18 Wis. 331, 86 A. D. 769; *Milwaukee & C. R. Co. v. Hunter*, 11 Wis. 160, 78 A. D. 699.

And see *Downey v. Gemini Min. Co.*, 24 Utah, 431, 91 A. S. R. 798.

<sup>643</sup> *Burns v. C., M. & St. P. R. Co.*, 69 Iowa, 450, 58 A. R. 227; *Teipel v. Hilsendegen*, 44 Mich. 461; *Hendrickson v. G. N. R. Co.*, 49 Minn. 245, 32 A. S. R. 540; *Lyman v. B. & M. R. Co.*, 66 N. H. 200, 11 L. R. A. 364, 366; *Johnson v. H. R. R. Co.*, 20 N. Y. 65, 75 A. D. 375; *Ouversen v. Grafton*, 5 N. D. 281; *Prideaux v. Mineral Point*, 43 Wis. 513, 28 A. R. 558; *Hoyt v. Hudson*, 41 Wis. 105, 22 A. R. 714, 719.

<sup>644</sup> *Higman v. Camody*, 112 Ala. 257, 57 A. S. R. 33; *Buswell v. Fuller*, 89 Me. 600.

*Warehouseman.* *Baltimore & O. R. Co. v. Schumacher*, 29 Md. 168, 96 A. D. 510; *Gay v. Bates*, 99 Mass. 263; *Lancaster Mills v. Merchants' C. P. Co.*, 89 Tenn. 1, 24 A. S. R. 536.

account for them, the bailor discharges the burden of adducing evidence which rests on him at the outset, and thereby makes a prima facie case in his favor, so that the burden of adducing evidence by way of explanation of the default is shifted to the bailee.<sup>645</sup> It is sufficient rebuttal of the plaintiff's prima facie case where the defendant adduces evidence tending to show that the default was caused by the loss or destruction or theft of the goods. He need not offer evidence in addition

<sup>645</sup> *Higman v. Camody*, 112 Ala. 257, 57 A. S. R. 33; *Mills v. Gilbreth*, 47 Me. 320, 74 A. D. 487; *Woodruff v. Painter*, 150 Pa. 91, 30 A. S. R. 786 (semble).

*Boom company.* *Chesley v. Miss. & R. R. Boom Co.*, 39 Minn. 83.

*Borrower.* *Prince v. Ala. State Fair*, 106 Ala. 340, 28 L. R. A. 716.

*Private carrier.* *Verner v. Sweltzer*, 32 Pa. 208; *Beckman v. Shouse*, 5 Rawle (Pa.) 179, 28 A. D. 653.

*Warehouseman.* *Roche v. Fraser*, 7 L. C. 472; *Taussig v. Bode*, 134 Cal. 260, 54 L. R. A. 774; *Wilson v. So. Pac. R. Co.*, 62 Cal. 164; *Boles v. H. & N. H. R. Co.*, 37 Conn. 272, 9 A. R. 347; *Cumins v. Wood*, 44 Ill. 416, 92 A. D. 189; *Cass v. B. & L. R. Co.*, 14 Allen (Mass.) 448; *Clark v. Spence*, 10 Watts (Pa.) 335; *Lancaster Mills v. Merchants' C. P. Co.*, 89 Tenn. 1, 24 A. S. R. 586.

*Banker, pledgee, or depositary.* *Merchants' Nat. Bank v. Gullmartin*, 93 Ga. 503, 44 A. S. R. 182; *Merchants' Nat. Bank v. Carhart*, 95 Ga. 394, 51 A. S. R. 95; *Ouderkirk v. Cent. Nat. Bank*, 119 N. Y. 263; *Isham v. Post*, 141 N. Y. 100, 38 A. S. R. 766; *First Nat. Bank v. Zent*, 39 Ohio St. 105; *Safe Deposit Co. v. Pollock*, 85 Pa. 391, 27 A. R. 660.

If a bank pays a deposit to a person other than the depositor, except upon his order, it has the burden of showing, not only that the depositor did not own the fund, but also that the payee did own it. *Ganley v. Troy City Nat. Bank*, 98 N. Y. 487; *Patterson v. Marine Nat. Bank*, 130 Pa. 419, 17 A. S. R. 778. And see *Wetherly v. Straus*, 93 Cal. 283. If, however, a deposit is made by an agent, it is presumed, in favor of the bank, that he has authority to withdraw it. *Walker v. Manhattan Bank*, 25 Fed. 247.

In an action by a depositor against the bank to recover the amount paid by it on a forged check, the burden is on the bank to show that it sustained injury by the negligence of the depositor, if it defends on that ground. *Janin v. London & S. F. Bank*, 92 Cal. 14, 27 A. S. R. 82; *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 57 L. R. A. 529.



to show that the loss, destruction, or theft did not occur through his negligence. On the contrary, the presumption is that he exercised due care, and, if the plaintiff asserts the contrary, the burden is on him to show it.<sup>646</sup>

If it appears that the bailee returned the property to the bailor in a damaged condition, ordinary wear and tear excepted,<sup>647</sup> then the burden is on the bailee to show that the injury did not occur through his negligence.<sup>648</sup>

<sup>646</sup> *Higman v. Camody*, 112 Ala. 257, 57 A. S. R. 33; *Mills v. Gilbreth*, 47 Me. 320, 74 A. D. 487; *Stewart v. Stone*, 127 N. Y. 500, 14 L. R. A. 215; *Beckman v. Shouse*, 5 Rawle (Pa.) 179, 28 A. D. 653.

*Bailee with option to buy.* *Knights v. Piella*, 111 Mich. 9, 66 A. S. R. 375.

*Postmaster.* *Raisler v. Oliver*, 97 Ala. 710, 38 A. S. R. 213.

*Warehouseman.* *Taussig v. Bode*, 134 Cal. 260, 54 L. R. A. 774; *Wilson v. So. Pac. R. Co.*, 62 Cal. 164; *Denton v. C., R. I. & P. R. Co.*, 52 Iowa, 161, 35 A. R. 263; *Cass v. B. & L. R. Co.*, 14 Allen (Mass.) 448, 452; *Lamb v. Western R. Corp.*, 7 Allen (Mass.) 98; *Claffin v. Meyer*, 75 N. Y. 260, 31 A. R. 467; *Schmidt v. Blood*, 9 Wend. (N. Y.) 263, 24 A. D. 143; *Clark v. Spence*, 10 Watts (Pa.) 335; *Lancaster Mills v. Merchants' C. P. Co.*, 89 Tenn. 1, 24 A. S. R. 586.

*Depositary.* *Wylie v. Northampton Bank*, 119 U. S. 361. If, however, the loss of a special deposit occurs through the negligence or dishonesty of an employe of the depositary, the burden is on it to show reasonable care on its part as to the selection and retention of the employe. *Merchants' Nat. Bank v. Carhart*, 95 Ga. 394, 51 A. S. R. 95.

In some states the rule stated in the text does not prevail, and the burden of showing want of negligence rests accordingly on the bailee. *Chicopee Bank v. Phila. Bank*, 8 Wall. (U. S.) 641; *Wilson v. Cal. C. R. Co.*, 94 Cal. 166, 17 L. R. A. 685 (semble); *Brown v. Waterman*, 10 Cush. (Mass.) 117 (semble).

<sup>647</sup> *Wintringham v. Hayes*, 144 N. Y. 1, 43 A. S. R. 725 (semble).

Where the property is of such a nature that the bailee is not absolutely bound to return it in the same condition as it was in when he received it, the fact of injury does not throw the burden of adducing evidence on the bailee. *Malaney v. Taft*, 60 Vt. 571, 6 A. S. R. 135.

<sup>648</sup> *Higman v. Camody*, 112 Ala. 257, 57 A. S. R. 33; *Funkhouser v. Wagner*, 62 Ill. 59; *Buswell v. Fuller*, 89 Me. 600; *Wintringham v. Hayes*, 144 N. Y. 1, 43 A. S. R. 725; *Collins v. Bennett*, 46 N. Y. 490; *Logan v. Mathews*, 6 Pa. 417.

(b) **Innkeepers.** The rule is different with reference to innkeepers. If a guest's property disappears while he is at an hotel, he makes a prima facie case against the landlord by showing the loss, and the landlord is thereupon charged with the burden of adducing evidence tending to show that neither he nor his servants were in fault.<sup>649</sup> And the same rule applies where the property of the guest is injured or destroyed while in the landlord's custody.<sup>650</sup>

In many states the rule of liability is more stringent in favor of the guest, and the innkeeper can exonerate himself from liability for the loss or injury only by showing that it occurred by act of God or the public enemy or by fault of the guest himself or his servants, or doubtless by restraint of law or by reason of some inherent defect in the property itself. In these jurisdictions it does not excuse the innkeeper that he exer-

*Warehouseman.* *Cumins v. Wood*, 44 Ill. 416, 92 A. D. 189. If it appears that the goods were damaged by the fall of the warehouse wherein they were stored, the burden of showing due care in regard to inspecting the condition of the building does not rest on the warehouseman. On the contrary, the burden of showing negligence in this respect rests on the plaintiff. *Willett v. Rich*, 142 Mass. 356, 56 A. R. 684.

To recover for damage to goods placed in cold storage, the owner need not prove more than that the goods, when delivered to the warehouseman, were, according to the usual and ordinary test of commerce, sound. He need not show that the goods were not affected by insect life when stored, or that a process of deterioration had not then begun. *Marks v. N. O. Cold Storage Co.*, 107 La. 172, 90 A. S. R. 285.

<sup>649</sup> *Metcalf v. Hess*, 14 Ill. 129; *Johnson v. Richardson*, 17 Ill. 302, 63 A. D. 369; *Baker v. Dessauer*, 49 Ind. 28; *Kisten v. Hildebrand*, 9 B. Mon. (Ky.) 72, 48 A. D. 416; *Wiser v. Chesley*, 53 Mo. 547; *Newson v. Axon*, 1 McCord (S. C.) 509, 10 A. D. 685; *Howth v. Franklin*, 20 Tex. 798, 73 A. D. 218; *McDaniels v. Robinson*, 26 Vt. 316, 62 A. D. 574; *Read v. Amidon*, 41 Vt. 15, 98 A. D. 560, 561; *Oriental Hotel Ass'n v. Faust* (Tex.) 86 S. W. 373.

A presumption of negligence on the part of the innkeeper does not arise from the fact that a fire originates in the premises and destroys the life of a guest. *Weeks v. McNulty*, 101 Tenn. 495, 70 A. S. R. 693.

<sup>650</sup> *Dawson v. Chamney*, 5 Q. B. 164; *Hill v. Owen*, 5 Blackf. (Ind.) 323, 35 A. D. 124; *Laird v. Eichold*, 10 Ind. 212, 71 A. D. 323.

cised due care. He is liable as an insurer without reference to whether he was negligent.<sup>651</sup>

The rule casting on the innkeeper the burden of showing due care does not apply in favor of permanent boarders or others staying at the hotel under a special contract;<sup>652</sup> and, in cases where the rule applies, the recovery is restricted to damages for the loss of or injury to only such property as the guest has with him for the purposes of the journey.<sup>653</sup>

(c) **Telegraph companies.** In an action against a telegraph company for negligence in reference to the transmission of a message, the plaintiff makes a prima facie case by adducing evidence that the message was not transmitted by the company in the form in which it was delivered and accepted for transmission, to the plaintiff's damage; and the burden of adducing evidence then shifts to the defendant, who must offer evidence

<sup>651</sup> *Loss.* *Mateer v. Brown*, 1 Cal. 221, 52 A. D. 303; *Pinkerton v. Woodward*, 33 Cal. 557, 91 A. D. 657; *Norcross v. Norcross*, 53 Me. 163; *Towson v. Havre de Grace Bank*, 6 Har. & J. (Md.) 47, 14 A. D. 254; *Mason v. Thompson*, 9 Pick. (Mass.) 280, 20 A. D. 471; *Dunbier v. Day*, 12 Neb. 596, 41 A. R. 772; *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 38 A. D. 663; *Clute v. Wiggins*, 14 Johns. (N. Y.) 175, 7 A. D. 448; *Hulett v. Swift*, 33 N. Y. 571, 88 A. D. 405; *Piper v. Manny*, 21 Wend. (N. Y.) 282; *Neal v. Wilcox*, 49 N. C. (4 Jones) 146, 67 A. D. 266.

*Injury.* *Russell v. Fagan*, 7 Houst. (Del.) 389; *Shaw v. Berry*, 31 Me. 478, 52 A. D. 628; *Sibley v. Aldrich*, 33 N. H. 553, 66 A. D. 745.

This strict rule does not prevail in all states. *Cutler v. Bonney*, 30 Mich. 259, 18 A. R. 127. And see cases cited in the two notes preceding.

<sup>652</sup> *Chamberlain v. Masterson*, 26 Ala. 371; *Horner v. Harvey*, 3 Johns. (N. M.) 197; *Mowers v. Fethers*, 61 N. Y. 34, 19 A. R. 244; *Neal v. Wilcox*, 49 N. C. (4 Jones) 146, 67 A. D. 266; *Manning v. Wells*, 9 Humph. (Tenn.) 746, 51 A. D. 688.

<sup>653</sup> *Fisher v. Kelsey*, 121 U. S. 383; *Neal v. Wilcox*, 49 N. C. (4 Jones) 146, 67 A. D. 266.

The innkeeper's liability is not restricted to the guest's reasonable traveling expenses, however. *Berkshire Woollen Co. v. Proctor*, 7 Cush. (Mass.) 417; *Smith v. Wilson*, 36 Minn. 334; *Wilkins v. Earle*, 44 N. Y. 172, 4 A. R. 655. *Contra*, *Trelber v. Burrows*, 27 Md. 130.

tending to show that it exercised due care.<sup>654</sup> A prima facie case casting the burden of adducing evidence on the company is also made where nondelivery<sup>655</sup> or unreasonable delay in delivery<sup>656</sup> of the message is shown.

— **Connecting lines.** If a telegraph company sued for negligence in transmission would avoid liability on the ground that the mistake occurred on some connecting line, it has the burden of proving that fact.<sup>657</sup>

<sup>654</sup> *W. U. Tel. Co. v. Chamblee*, 122 Ala. 428, 82 A. S. R. 89; *W. U. Tel. Co. v. Tyler*, 74 Ill. 168, 24 A. R. 279; *Tyler v. W. U. Tel. Co.*, 60 Ill. 421, 14 A. R. 38; *W. U. Tel. Co. v. Meek*, 49 Ind. 53 (semble); *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458, 20 A. R. 605; *W. U. Tel. Co. v. Crall*, 38 Kan. 679, 5 A. S. R. 795; *Ayer v. W. U. Tel. Co.*, 79 Me. 493, 1 A. S. R. 353; *Bartlett v. W. U. Tel. Co.*, 62 Me. 209, 16 A. R. 437; *W. U. Tel. Co. v. Carew*, 15 Mich. 525, 534 (semble); *Reed v. W. U. Tel. Co.*, 135 Mo. 661, 58 A. S. R. 609; *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263, 4 A. R. 673; *Hendricks v. W. U. Tel. Co.*, 126 N. C. 304, 78 A. S. R. 658; *Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 A. R. 500; *Pinckney v. W. U. Tel. Co.*, 19 S. C. 71, 81 (semble).

The contrary is held in some states where the contract of transmission contains a condition requiring a party who desires a message to be sent with absolute correctness to have it repeated. *White v. W. U. Tel. Co.*, 14 Fed. 710; *Sweatland v. Ill. & M. Tel. Co.*, 27 Iowa, 433, 1 A. R. 285; *U. S. Tel. Co. v. Gildersleve*, 29 Md. 232 (semble); *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *Becker v. W. U. Tel. Co.*, 11 Neb. 87, 38 A. R. 356.

The burden of proving that the damages resulted from the company's negligence rests on the sender of the message. *McPeck v. W. U. Tel. Co.*, 107 Iowa, 356, 70 A. S. R. 205.

<sup>655</sup> *W. U. Tel. Co. v. Howell*, 95 Ga. 194, 51 A. S. R. 68; *Fowler v. W. U. Tel. Co.*, 80 Me. 381, 6 A. S. R. 211; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744, 6 A. R. 165, 170. *Contra*, *U. S. Tel. Co. v. Gildersleve*, 29 Md. 232.

<sup>656</sup> *Harkness v. W. U. Tel. Co.*, 73 Iowa, 190, 5 A. S. R. 672.

If, however, delivery limits have been prescribed, the burden of showing that the addressee resided within the limits rests on the plaintiff, in an action for delay in delivery. *W. U. Tel. Co. v. Henderson*, 59 Ala. 510, 18 A. S. R. 148.

<sup>657</sup> *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458, 20 A. R. 605; *De La Grange v. S. W. Tel. Co.*, 25 La. Ann. 383.

(d) **Carriers of goods.** In an action against a common carrier of goods for injury or loss, the plaintiff bears throughout the trial the burden of proof in the sense that he must convince the jury of the existence of the facts on which his right to recover depends, and as an incident thereto he bears at the beginning of the trial the burden of adducing evidence of an undertaking to carry and a default therein on the part of the carrier.<sup>658</sup> The plaintiff makes a *prima facie* case, however, by showing that the carrier undertook to carry the goods, and that they were delivered to the consignee in a damaged condition, or that they were not delivered in the ordinary course of business, or that they were not delivered at all. The burden of adducing evidence then shifts to the carrier, who must offer evidence tending to show that its default was due to act of God or of the public enemy, or to restraint of law, or to some inherent defect in the property itself, or to some fault on the part of the shipper,<sup>659</sup> or that the loss, injury, or delay is other-

<sup>658</sup> *Western Transp. Co. v. Downer*, 11 Wall. (U. S.) 129; *Cooper v. Ga. Pac. R. Co.*, 92 Ala. 329, 25 A. S. R. 59; *South & N. A. R. Co. v. Wood*, 71 Ala. 215, 46 A. R. 309; *Savannah, F. & W. R. Co. v. Harris*, 26 Fla. 148, 23 A. S. R. 551; *Woodbury v. Frink*, 14 Ill. 279; *Boehl v. C., M. & St. P. R. Co.*, 44 Minn. 191; *Mann v. Birchard*, 40 Vt. 326, 94 A. D. 398.

*Loss of baggage.* *Long v. Pa. R. Co.*, 147 Pa. 343, 30 A. S. R. 732.

If, when sued for failure to deliver the goods, the carrier admits the contract, and alleges, by way of affirmative defense, that the goods were safely carried to their destination, and held thereafter by the carrier simply as warehouseman until their destruction by fire without fault on its part, the burden of proving that defense, including freedom from negligence, rests on the carrier. *Wilson v. Cal. C. R. Co.*, 94 Cal. 166, 17 L. R. A. 685.

<sup>659</sup> UNITED STATES: *Nelson v. Woodruff*, 1 Black, 156. And see, generally, 7 Current Law, 548.

ALABAMA: *McCarthy v. L. & N. R. Co.*, 102 Ala. 193, 48 A. S. R. 29; *Richmond & D. R. Co. v. Trousdale*, 99 Ala. 389, 42 A. S. R. 69.

FLORIDA: *Savannah, F. & W. R. Co. v. Harris*, 26 Fla. 148, 23 A. S. R. 551.

GEORGIA: *Cent. R. Co. v. Hasselkus*, 91 Ga. 382, 44 A. S. R. 37; *Van*

wise within an exception of the bill of lading or shipping receipt.<sup>660</sup>

*Winkle v. S. C. R. Co.*, 38 Ga. 32; *Southern Exp. Co. v. Newby*, 36 Ga. 635, 91 A. D. 783.

ILLINOIS: *Dunseth v. Wade*, 3 Ill. 285.

IOWA: *Mitchell v. U. S. Exp. Co.*, 46 Iowa, 214.

LOUISIANA: *Montgomery v. Ship Abby Pratt*, 6 La. Ann. 410; *Kirk v. Folsom*, 23 La. Ann. 584; *Chapman v. N. O., J. & G. N. R. Co.*, 21 La. Ann. 224, 99 A. D. 722; *Hunt v. Morris*, 6 Mart. 676, 12 A. D. 489.

MAINE: *Little v. B. & M. R. R.*, 66 Me. 239; *Bennett v. American Exp. Co.*, 83 Me. 236, 23 A. S. R. 774.

MINNESOTA: *Hull v. C., St. P., M. & O. R. Co.*, 41 Minn. 510, 16 A. S. R. 722, 724 (semble); *Boehl v. C., M. & St. P. R. Co.*, 44 Minn. 191.

NEW HAMPSHIRE: *Hall v. Cheney*, 36 N. H. 26.

NEW YORK: *Wheeler v. Oceanic S. N. Co.*, 125 N. Y. 155, 21 A. S. R. 729.

NORTH CAROLINA: *Hinkle v. S. R. Co.*, 126 N. C. 932, 78 A. S. R. 685.

PENNSYLVANIA: *Leonard v. Hendrickson*, 18 Pa. 40, 55 A. D. 587; *Pa. R. Co. v. Raiordon*, 119 Pa. 577, 4 A. S. R. 670, 671 (semble).

SOUTH CAROLINA: *Smyrl v. Niolon*, 2 Bailey, 421, 23 A. D. 146; *Ewart v. Street*, 2 Bailey, 157, 23 A. D. 131.

TENNESSEE: *Merchants' Dispatch Transp. Co. v. Bloch*, 86 Tenn. 392, 6 A. S. R. 847.

VERMONT: *Mann v. Birchard*, 40 Vt. 326, 94 A. D. 398.

WISCONSIN: *Browning v. Goodrich Transp. Co.*, 78 Wis. 391, 23 A. S. R. 414.

Slight evidence of loss or nondelivery will suffice to shift the burden of adducing evidence to the carrier. *Chicago & N. W. R. Co. v. Dickinson*, 74 Ill. 249; *Day v. Ridley*, 16 Vt. 48, 42 A. D. 489. And see *Griffiths v. Lee*, 1 Car. & P. 110. But the burden of adducing evidence does not thus shift if the plaintiff's own evidence tends to show that the cause of the loss is one for which the carrier is not liable. *The Henry B. Hyde*, 90 Fed. 114, 32 C. C. A. 534; *Bell v. Reed*, 4 Bin. (Pa.) 127, 5 A. D. 398.

If a carrier delivers the goods to one other than the consignee, it assumes the burden of proving the latter's ownership or agency. *Adams v. Blankenstein*, 2 Cal. 413, 56 A. D. 350; *Wolfe v. Mo. Pac. R. Co.*, 97 Mo. 473, 10 A. S. R. 331; *Shenk v. Phila. Steam Propeller Co.*, 60 Pa. 109, 100 A. D. 541. And see *Lawrence v. Minturn*, 17 How. (U. S.) 100, 107.

Loss of personal effects in the custody of a passenger on a sleeping car does not raise a presumption of negligence on the carrier's part,

Hammon, Ev.—19.

Even though the loss or injury or delay is within an exception of the contract of carriage, yet, if it occurs through the

and, accordingly, the burden of adducing evidence of negligence rests on the passenger. *Carpenter v. N. Y., N. H. & H. R. Co.*, 124 N. Y. 53, 21 A. S. R. 644.

A carrier, in accepting goods for shipment, is presumed to know whether they can be transported without such delay as will injure or destroy goods of the character accepted. *Blodgett v. Abbot*, 72 Wis. 516, 7 A. S. R. 873.

<sup>460</sup> UNITED STATES: *Clark v. Barnwell*, 12 How. 272; *Rich v. Lambert*, 12 How. 347; *Bancroft-Whitney Co. v. Queen of the Pac.*, 75 Fed. 74.

FLORIDA: *Bennett v. Filyaw*, 1 Fla. 403.

ILLINOIS: *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 A. D. 760; *Chicago & N. W. R. Co. v. Calumet Stock Farm*, 194 Ill. 9, 88 A. S. R. 69.

INDIANA: *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 32 A. S. R. 239.

KANSAS: *Kallman v. U. S. Exp. Co.*, 3 Kan. 205.

MAINE: *Fillebrown v. G. T. R. Co.*, 55 Me. 462, 92 A. D. 606.

MASSACHUSETTS: *Alden v. Pearson*, 3 Gray, 342; *Shaw v. Gardner*, 12 Gray, 488.

MICHIGAN: *McMillan v. Mich. S. & N. I. R.*, 16 Mich. 79, 93 A. D. 208; *Bonfiglio v. L. S. & M. S. R. Co.*, 125 Mich. 476.

MINNESOTA: *Hull v. C., St. P., M. & O. R. Co.*, 41 Minn. 510, 16 A. S. R. 722; *Lindsley v. C., M. & St. P. R. Co.*, 36 Minn. 539, 1 A. S. R. 692; *Hinton v. E. R. Co.*, 72 Minn. 339.

MISSISSIPPI: *Southern Exp. Co. v. Moon*, 39 Miss. 822.

MISSOURI: *Witting v. St. L. & S. F. R. Co.*, 101 Mo. 631, 20 A. S. R. 636; *Hill v. Sturgeon*, 28 Mo. 323; *Wolf v. American Exp. Co.*, 43 Mo. 421, 97 A. D. 406; *Read v. St. L., K. C. & N. R. Co.*, 60 Mo. 199.

NORTH CAROLINA: *Mitchell v. C. C. R. Co.*, 124 N. C. 236, 44 L. R. A. 515.

OHIO: *U. S. Exp. Co. v. Backman*, 28 Ohio St. 144; *Pittsburgh, C. & St. L. R. Co. v. Barrett*, 36 Ohio St. 448, 453.

SOUTH CAROLINA: *Wallingford v. C. & G. R. Co.*, 26 S. C. 258; *Johnstone v. R. & D. R. Co.*, 39 S. C. 55; *Cameron v. Rich*, 4 Strob. Law, 168, 53 A. D. 670.

TENNESSEE: *Turney v. Wilson*, 7 Yerg. 340, 27 A. D. 515.

TEXAS: *Mo. Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26.

WEST VIRGINIA: *Brown v. Adams Exp. Co.*, 15 W. Va. 812.

WISCONSIN: *Browning v. Goodrich Transp. Co.*, 78 Wis. 391, 23 A. S. R. 414.

The same rule applies in favor of a passenger whose baggage has been

negligence of the carrier, he is nevertheless liable.<sup>681</sup> Accordingly, in order to rebut the prima facie case made against him by evidence of a default, he must in many jurisdictions adduce evidence, not only that the loss, injury, or delay arose from an excepted cause, but also that he was not guilty of negligence contributing to it.<sup>682</sup> In other jurisdictions a con-

lost or injured in transit. *Montgomery & E. R. Co. v. Culver*, 75 Ala. 587.

A stipulation limiting the carrier's common-law liability, to be valid, must be reasonable, and the burden of showing it so rests on the carrier. *Hinkle v. So. R. Co.*, 126 N. C. 932, 78 A. S. R. 685 (semble); *Tex. & P. R. Co. v. Reeves*, 90 Tex. 499. And see *Cox v. Cent. Vt. R.*, 170 Mass. 129.

<sup>681</sup> *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 32 A. S. R. 239; *Sager v. P., S. & P. & E. R. Co.*, 31 Me. 228, 50 A. D. 659; *Boehl v. C., M. & St. P. R. Co.*, 44 Minn. 191; *Witting v. St. L. & S. F. R. Co.*, 101 Mo. 631, 20 A. S. R. 636; *Lamb v. C. & A. R. & T. Co.*, 46 N. Y. 271, 7 A. R. 327.

The rule is the same as to carriers of passengers. *Richmond v. So. Pac. Co.*, 41 Or. 54, 93 A. S. R. 694; *Crary v. L. V. R. Co.*, 203 Pa. 525, 93 A. S. R. 778.

<sup>682</sup> ALABAMA: *Grey's Ex'r v. Mobile Trade Co.*, 55 Ala. 387, 28 A. R. 729; *Steele v. Townsend*, 37 Ala. 247, 79 A. D. 49.

CONNECTICUT: *Mears v. N. Y., N. H. & H. R. Co.*, 75 Conn. 171, 56 L. R. A. 884.

GEORGIA: *Berry v. Cooper*, 28 Ga. 543; *Ga. R. & B. Co. v. Keener*, 93 Ga. 808, 44 A. S. R. 197.

LOUISIANA: *Tardos v. Ship Toulon*, 14 La. Ann. 429, 74 A. D. 435.

MINNESOTA: *Hinton v. E. R. Co.*, 72 Minn. 339; *Shriver v. S. C. & St. P. R. Co.*, 24 Minn. 506, 31 A. R. 353.

MISSISSIPPI: *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 1003, 45 A. R. 428; *Newberger Cotton Co. v. Ill. C. R. Co.*, 75 Miss. 303; *Johnson v. Ala. & V. R. Co.*, 69 Miss. 191, 30 A. S. R. 534.

NORTH CAROLINA: *Mitchell v. C. C. R. Co.*, 124 N. C. 236, 44 L. R. A. 515; *Hinkle v. So. R. Co.*, 126 N. C. 932, 78 A. S. R. 685, 688.

OHIO: *Gaines v. Union T. & I. Co.*, 28 Ohio St. 418; *U. S. Exp. Co. v. Backman*, 28 Ohio St. 144; *Graham v. Davis*, 4 Ohio St. 362, 62 A. D. 285.

PENNSYLVANIA: *Buck v. Pa. R. Co.*, 150 Pa. 170, 30 A. S. R. 800.

SOUTH CAROLINA: *Swindler v. Hilliard*, 2 Rich. Law, 286, 45 A. D.



trary view is upheld, and, when the carrier adduces evidence that the cause of the default is within an exception of the bill of lading or shipping receipt, the burden of adducing evidence shifts to the plaintiff, who must accordingly introduce evidence of negligence, if he asserts it.<sup>663</sup> In some cases a distinction is

732; *Baker v. Brinson*, 9 Rich. Law, 201, 67 A. D. 548; *Wallingford v. C. & G. R. Co.*, 26 S. C. 258.

TEXAS: *Ryan v. M., K. & T. R. Co.*, 65 Tex. 13, 57 A. R. 589; *Tex. & P. R. Co. v. Richmond*, 94 Tex. 571; *Mo. Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26.

WEST VIRGINIA: *Brown v. Adams Exp. Co.*, 15 W. Va. 812.

If, however, in addition to the fact of loss, delay, or injury, it appears that it occurred under circumstances which do not import negligence on the part of the carrier, the burden of proving negligence rests on the shipper. *Memphis & C. R. Co. v. Reeves*, 10 Wall. (U. S.) 176; *Buck v. Pa. R. Co.*, 150 Pa. 170, 30 A. S. R. 800; *Colton v. C. & P. R. Co.*, 67 Pa. 211, 5 A. R. 424.

<sup>663</sup> ENGLAND: *The Glendarroch* [1894] Prob. 226.

UNITED STATES: *Western Transp. Co. v. Downer*, 11 Wall. 129; *Clark v. Barnwell*, 12 How. 272; *The Henry B. Hyde*, 90 Fed. 114, 32 C. C. A. 534.

ARKANSAS: *Little Rock, M. R. & T. R. Co. v. Talbot*, 39 Ark. 523.

INDIANA: *Ins. Co. of N. A. v. L. E. & W. R. Co.*, 152 Ind. 333; *Reid v. E. & T. H. R. Co.*, 10 Ind. App. 385, 53 A. S. R. 391.

IOWA: *Mitchell v. U. S. Exp. Co.*, 46 Iowa, 214.

KANSAS: *Kan. Pac. R. Co. v. Reynolds*, 8 Kan. 623; *Kallman v. U. S. Exp. Co.*, 3 Kan. 205.

LOUISIANA: *Kirk v. Folsom*, 23 La. Ann. 584; *Kelham v. Steamship Kensington*, 24 La. Ann. 100.

MAINE: *Sager v. P., S. & P. & E. R. Co.*, 31 Me. 228, 50 A. D. 659.

MARYLAND: *Bankard v. B. & O. R. Co.*, 34 Md. 197, 6 A. R. 321.

MICHIGAN: *Smith v. American Exp. Co.*, 108 Mich. 572 (semble).

MISSOURI: *Witting v. St. L. & S. F. R. Co.*, 101 Mo. 631, 20 A. S. R. 636; *Otis Co. v. Mo. Pac. R. Co.*, 112 Mo. 622; *Stanard Mill Co. v. White Line C. T. Co.*, 122 Mo. 258; *Read v. St. L., K. C. & N. R. Co.*, 60 Mo. 199.

NEW YORK: *Lamb v. C. & A. R. & T. Co.*, 46 N. Y. 271, 7 A. R. 327; *Whitworth v. E. R. Co.*, 87 N. Y. 413.

TENNESSEE: *Lancaster Mills v. Merchants' C. P. Co.*, 89 Tenn. 1, 24 A. S. R. 586; *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653.

It is held in Pennsylvania, however, that if the shipper introduces

made in reference to this latter point where the shipper accompanies his property in transit. Here, it is thought, the shipper's means of knowledge are equal to the carrier's, and the burden of showing negligence therefore rests on him when the carrier shows that the default was due to a cause excepted by the bill of lading or shipping receipt.<sup>664</sup>

— **Connecting carriers.** In the case of connecting carriers, if goods received by the consignee in a damaged condition are shown to have been delivered in good condition to the initial carrier, the presumption is that they were in that condition when they came into the hands of the last carrier, and he may accordingly be held liable, in the absence of evidence to disprove the presumption.<sup>665</sup> So, if the goods delivered to the

evidence of an injurious accident, a presumption of negligence arises, and the carrier must rebut it. *Buck v. Pa. R. Co.*, 150 Pa. 170, 30 A. S. R. 800; *Pa. R. Co. v. Ralordon*, 119 Pa. 577, 4 A. S. R. 670.

Evidence of negligence may be expressly required of the shipper by stipulation in the bill of lading. *Platt v. R., Y. R. & C. R. Co.*, 108 N. Y. 358; *Schaller v. C. & N. W. R. Co.*, 97 Wis. 31.

These rules are the same as to carriers of passengers. *Crary v. L. V. R. Co.*, 203 Pa. 525, 93 A. S. R. 778.

<sup>664</sup> *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397, 7 A. S. R. 104; *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 32 A. S. R. 239; *Greve v. Ill. Cent. R. Co.*, 104 Iowa, 659; *Clark v. St. L., K. C. & N. R. Co.*, 64 Mo. 440. *Contra*, *Crawford v. S. R. Co.*, 56 S. C. 136.

It will be observed that the cases in which this distinction is made, with the exception of the Texas case cited below, were decided in those states, as listed in the preceding note, wherein it is held that the burden of adducing evidence of negligence rests on the shipper.

The rule that, where a carrier limits its liability to cases of injury received on its own line, and the goods are injured, the burden is on the carrier to show that the injury did not occur on its own line, or, if the injury occurred in part on its own line, and in part on a connecting line, it must show what part of the injury occurred on its own line in order to relieve itself from liability for the whole, does not apply to shipments of live stock which the shipper accompanies in transit and agrees to care for. *St. Louis S. W. R. Co. v. Vaughan* (Tex. Civ. App.) 41 S. W. 415.

<sup>665</sup> *Cooper v. Ga. Pac. R. Co.*, 92 Ala. 329, 25 A. S. R. 59; *Savannah*,

initial carrier are shown to have been lost or destroyed, and suit is brought against a connecting carrier, the burden of showing that the default did not occur on its line rests upon the defendant.<sup>666</sup> The operation of this presumption is limited to the last connecting carrier. It does not prevail against an intermediate carrier through whose hands the goods have passed.<sup>667</sup>

If, by its contract with the shipper, the initial carrier undertakes to deliver the goods, not at their destination, but only to the next connecting carrier, the shipper makes a *prima facie* case against the initial carrier by showing nondelivery at the point of destination, and the burden is accordingly cast

*F. & W. R. Co. v. Harris*, 26 Fla. 148, 23 A. S. R. 551; *Forrester v. Ga. R. & B. Co.*, 92 Ga. 699; *Beard v. Ill. Cent. R. Co.*, 79 Iowa, 518, 18 A. S. R. 381; *Cote v. N. Y., N. H. & H. R. Co.*, 182 Mass. 290, 94 A. S. R. 656; *Shriver v. S. C. & St. P. R. Co.*, 24 Minn. 506, 31 A. R. 353; *Mobile & O. R. Co. v. Tupelo F. Mfg. Co.*, 67 Miss. 35, 19 A. S. R. 262; *Smith v. N. Y. Cent. R. Co.*, 43 Barb. 225, affirmed 41 N. Y. 620; *Hinkle v. So. R. Co.*, 126 N. C. 932, 78 A. S. R. 685; *Morganton Mfg. Co. v. O. R. & C. R. Co.*, 121 N. C. 514, 61 A. S. R. 679; *Dixon v. R. & D. R. Co.*, 74 N. C. 538; *Texas & P. R. Co. v. Adams*, 78 Tex. 372, 22 A. S. R. 56. *Contra*, *Marquette, H. & O. R. Co. v. Kirkwood*, 45 Mich. 51, 40 A. R. 453.

The rule is the same, even where the goods were sent through in the same car. *Leo v. St. P., M. & M. R. Co.*, 30 Minn. 438.

The same presumption arises against the last connecting carrier, where baggage is delivered to the passenger at the end of the route in a damaged condition. *Montgomery & E. R. Co. v. Culver*, 75 Ala. 587; *Moore v. N. Y., N. H. & H. R. Co.*, 173 Mass. 335, 73 A. S. R. 298, *Thayer*, Cas. Ev. 51.

The fact of delivery in bad order by the last connecting carrier does not found a presumption against the initial carrier that the injury occurred on its line. *Montgomery & E. R. Co. v. Culver*, 75 Ala. 587.

<sup>666</sup> *Cooper v. Ga. Pac. R. Co.*, 92 Ala. 329, 25 A. S. R. 59; *Savannah, F. & W. R. Co. v. Harris*, 26 Fla. 148, 23 A. S. R. 551; *Faison v. Ala. & V. R. Co.*, 69 Miss. 569, 30 A. S. R. 577; *Memphis & C. R. Co. v. Holloway*, 68 Tenn. 188; *Laughlin v. C. & N. W. R. Co.*, 28 Wis. 204, 9 A. R. 493.

<sup>667</sup> *Montgomery & E. R. Co. v. Culver*, 75 Ala. 587.

on it to show that it delivered the goods to the next connecting carrier as agreed.<sup>668</sup>

§ 69. Carriers of passengers.

If a passenger is injured or killed, and the carrier is sued in consequence, the plaintiff bears throughout the trial the burden of proof in the sense that he must convince the jury of the existence of the facts on which his right of action depends; and as an incident thereto he also bears at the beginning of the trial the burden of adducing evidence tending to show the undertaking to carry, and that while in the defendant's care the passenger was injured or killed as the result of the defendant's negligence.<sup>669</sup>

(a) *Res ipsa loquitur*. The plaintiff makes a prima facie case, however, when he adduces evidence that the death or injury occurred without fault on the passenger's part because of an accident which in the ordinary course of events would not have happened in the absence of negligence on the part of the defendant or its servants. This done, a presumption of negligence arises, and the burden of adducing evidence shifts to the defendant, who must introduce evidence having a tendency to show that it was in the exercise of due care, or that the accident was such that due care could not have averted it.<sup>670</sup>

<sup>668</sup> *Montgomery & E. R. Co. v. Culver*, 75 Ala. 587.

<sup>669</sup> *Wall v. Livezey*, 6 Colo. 465; *Baltimore & O. R. Co. v. State*, 63 Md. 135; *Mexican Cent. R. Co. v. Lauricella*, 87 Tex. 277, 47 A. S. R. 103. See, generally, 7 Current Law, 591.

The presumption is that a person riding as a passenger is in fact such (*Louisville, N. A. & C. R. Co. v. Thompson*, 107 Ind. 442, 57 A. R. 120), unless the train is a freight train (*Purple v. U. P. R. Co.*, 114 Fed. 123, 57 L. R. A. 700; *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477, 20 L. R. A. 822).

<sup>670</sup> *Eagle Packet Co. v. Defries*, 94 Ill. 598, 34 A. R. 245; *Memphis & O. R. P. Co. v. McCool*, 83 Ind. 392, 43 A. R. 71; *Baltimore & P. R. Co. v. Swann*, 81 Md. 400, 31 L. R. A. 313; *Lincoln St. R. Co. v. McClellan*, 54 Neb. 672, 69 A. S. R. 736; *Whalen v. Consol. Traction Co.*,

Many sorts of accidents thus give rise to a presumption of negligence on the part of the carrier, among which may be mentioned the collision of trains or cars on the same line of road;<sup>671</sup> the derailment of the car;<sup>672</sup> the sudden jerking or

61 N. J. Law, 606, 68 A. S. R. 723; *Miller v. Ocean S. S. Co.*, 118 N. Y. 199; *Budd v. United Carriage Co.*, 25 Or. 314, 27 L. R. A. 279; *Keator v. Scranton Traction Co.*, 191 Pa. 102, 44 L. R. A. 546.

*Landslide.* *Gleeson v. Va. M. R. Co.*, 140 U. S. 435. See, however, *Fleming v. P., C., & St. L. R.*, 158 Pa. 130, 38 A. S. R. 835.

*Washout.* *Phila. & R. R. Co. v. Anderson*, 94 Pa. 351, 39 A. R. 787.

*Bursting of boiler.* *The Reliance*, 4 Woods, 420, 2 Fed. 249. And see *The Sydney*, 27 Fed. 119; *Spear v. Phila., W. & B. R. Co.*, 119 Pa. 61. Explosions generally, see page 272, *supra*.

The presumption of negligence arises without distinction between accidents caused by defects in the equipment or errors in the management of the train and those caused by the misconduct of copassengers. *Pittsburg & C. R. Co. v. Pillow*, 76 Pa. 510, 18 A. R. 424. And in some states the presumption is created by statute. *S. W. R. v. Singleton*, 67 Ga. 306.

In some cases it is said that the mere fact that the passenger receives an injury without fault of his own raises a presumption of negligence on the part of the carrier. *Meier v. Pa. R. Co.*, 64 Pa. 225, 3 A. R. 581 (semble); *Laing v. Colder*, 8 Pa. 479, 49 A. D. 533 (semble). *Contra*, see cases cited in note 679, *infra*.

This presumption of negligence, while it shifts to defendant the burden of adducing evidence of due care, does not relieve plaintiff of the burden of convincing the jury of the existence of negligence on defendant's part. *Kay v. M. St. R. Co.*, 163 N. Y. 447.

<sup>671</sup> *Skinner v. L., B. & S. C. R. Co.*, 5 Exch. 787; *Carter v. Kan. City C. R. Co.*, 42 Fed. 37; *Ga. Pac. R. Co. v. Love*, 91 Ala. 432, 24 A. S. R. 927; *Smith v. St. P. City R. Co.*, 32 Minn. 1, 50 A. R. 550; *Graham v. B., C. R. & N. R. Co.*, 39 Minn. 81; *New Orleans, J. & G. N. R. Co. v. Allbritton*, 38 Miss. 242, 75 A. D. 98; *Kay v. M. St. R. Co.*, 163 N. Y. 447; *Iron R. Co. v. Mowery*, 36 Ohio St. 418, 38 A. R. 597; *Fredericks v. N. C. R. Co.*, 157 Pa. 103, 22 L. R. A. 306; *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 53 L. R. A. 586.

*Breaking apart of train and subsequent collision of parts.* *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126; *Tuttle v. C., R. I. & P. R. Co.*, 48 Iowa, 236.

*Collision of vessels.* *Bigelow v. Nickerson*, 70 Fed. 113, 30 L. R. A. 336.

bumping of cars;<sup>673</sup> the falling or breaking of a bridge;<sup>674</sup> the striking of a passenger by a passing train or some object pro-

Ordinarily, no presumption of negligence arises from the collision of a train or car with a train or car or vehicle or obstruction not under the carrier's control. *Chicago St. R. Co. v. Rood*, 163 Ill. 477, 54 A. S. R. 478; *Cent. Pass. R. Co. v. Kuhn*, 86 Ky. 578, 9 A. S. R. 309 (semble); *Federal St. & P. V. R. Co. v. Gibson*, 96 Pa. 83; *Hawkins v. F. St. C. R. Co.*, 3 Wash. St. 592, 28 A. S. R. 72. *Contra*, *Louisville, N. A. & C. R. Co. v. Hendricks*, 128 Ind. 462; *Sullivan v. Phila. & R. R. Co.*, 30 Pa. 234, 72 A. D. 698. And see *Carrico v. W. Va. C. & P. R. Co.*, 39 W. Va. 86, 24 L. R. A. 50. But when a passenger on a street car is injured by a collision between the car and a train at a railroad crossing, the presumption arises against the street car company. *Cent. Pass. R. Co. v. Kuhn*, 86 Ky. 578, 9 A. S. R. 309. And the same is true where a car on one line collides with a car on another. *Osgood v. L. A. Traction Co.*, 137 Cal. 280, 92 A. S. R. 171.

<sup>672</sup> IRELAND: *Flannery v. W. & L. R. Co.*, Ir. Rep. 11 C. L. 30.

ALABAMA: *Ala. G. S. R. Co. v. Hill*, 93 Ala. 514, 30 A. S. R. 65.

ARKANSAS: *St. Louis & S. F. R. Co. v. Mitchell*, 57 Ark. 418; *Ark. Midland R. v. Canman*, 52 Ark. 517; *George v. St. L., I. M. & S. R. Co.*, 34 Ark. 613; *Little Rock & F. S. R. Co. v. Miles*, 40 Ark. 298, 48 A. R. 10.

COLORADO: *Denver, S. P. & P. R. Co. v. Woodward*, 4 Colo. 1.

GEORGIA: *Cent. R. v. Sanders*, 73 Ga. 513 (statute).

ILLINOIS: *Peoria, P. & J. R. Co. v. Reynolds*, 88 Ill. 418; *Galena & C. U. R. Co. v. Yarwood*, 17 Ill. 509, 65 A. D. 682.

INDIANA: *Cleveland, C., C. & I. R. Co. v. Newell*, 75 Ind. 542; *Pittsburgh, C. & St. L. R. Co. v. Williams*, 74 Ind. 462.

MASSACHUSETTS: *Feital v. Middlesex R. Co.*, 109 Mass. 298, 12 A. R. 720.

MISSOURI: *Hipsley v. Kan. City, St. J. & C. B. R. Co.*, 88 Mo. 348; *Furnish v. Mo. Pac. R. Co.*, 102 Mo. 438, 22 A. S. R. 781.

NEBRASKA: *Spellman v. Lincoln R. T. Co.*, 36 Neb. 890, 38 A. S. R. 753.

NEW JERSEY: *Bergen County Traction Co. v. Demarest*, 62 N. J. Law, 755, 72 A. S. R. 685.

NEW YORK: *Curtis v. R. & S. R. Co.*, 18 N. Y. 534, 75 A. D. 258; *Seybolt v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 562, 47 A. R. 75; *Edgerton v. N. Y. & H. R. Co.*, 39 N. Y. 227, 229.

TEXAS: *Mexican Cent. R. Co. v. Lauricella*, 37 Tex. 277, 47 A. S. R. 103; *Gulf, C. & S. F. R. Co. v. Smith*, 74 Tex. 276.

And see *Mitchell v. S. Pac. R. Co.*, 87 Cal. 62, 11 L. R. A. 130; *Toledo*,

jecting from it;<sup>675</sup> the fall of a fixture in a car;<sup>676</sup> the upsetting of a vehicle drawn by horses;<sup>677</sup> and the fall of an elevator operated in a building for public use.<sup>678</sup>

The presumption of negligence will not thus arise, it will be observed, unless there is evidence tending to connect the carrier or its servants or some of its appliances with the happening of the accident. Accordingly, in the absence of such evidence, the carrier is not bound to show the cause of the accident, or that it exercised due care to protect the passenger. And even where the defendant's connection with the accident appears, yet no presumption of negligence arises unless it or the circumstances attending it are such as to indi-

W. & W. R. Co. v. Beggs, 85 Ill. 80; Cleveland, C., C. & I. R. Co. v. Newell, 104 Ind. 264.

<sup>675</sup> N. J. R. Co. v. Pollard, 22 Wall. (U. S.) 341; Birmingham Union R. Co. v. Hale, 90 Ala. 8, 24 A. S. R. 748; Augusta & S. R. Co. v. Randall, 79 Ga. 304; City & S. R. v. Flindley, 76 Ga. 311 (semble); Coudy v. St. L., I. M. & S. R. Co., 85 Mo. 79; Dougherty v. Mo. R. Co., 81 Mo. 325, 51 A. R. 239; Hite v. M. St. R. Co., 130 Mo. 132, 51 A. S. R. 555. And see Baltimore & P. R. Co. v. Swann, 81 Md. 400, 31 L. R. A. 313.

<sup>676</sup> Bedford, S., O. & B. R. Co. v. Rainbolt, 99 Ind. 551; Louisville, N. A. & C. R. Co. v. Snyder, 117 Ind. 435, 10 A. S. R. 60; Baltimore & O. R. Co. v. Noell's Adm'r, 32 Grat. (Va.) 394.

<sup>677</sup> Phila., W. & B. R. Co. v. Anderson, 72 Md. 519, 20 A. S. R. 483; Breen v. N. Y. C. & H. R. R. Co., 109 N. Y. 297, 4 A. S. R. 450; Holbrook v. U. & S. R., 12 N. Y. 236, 64 A. D. 502.

<sup>678</sup> Och v. Mo., K. & T. R. Co., 130 Mo. 27, 36 L. R. A. 442; Cleveland, C., C. & I. R. Co. v. Walrath, 38 Ohio St. 461, 43 A. R. 433. And see Carroll v. C., B. & M. R. Co., 99 Wis. 399, 67 A. S. R. 872.

<sup>677</sup> Stokes v. Saltonstall, 13 Pet. (U. S.) 181; Boyce v. Cal. Stage Co., 25 Cal. 460; Bush v. Barrett, 96 Cal. 202; Wall v. Livezey, 6 Colo. 465; Sanderson v. Frazier, 8 Colo. 79, 54 A. R. 544; Farish v. Reigle, 11 Grat. (Va.) 697, 62 A. D. 666. And see Christie v. Griggs, 2 Camp. 79; Lawrence v. Green, 70 Cal. 417, 59 A. R. 428; Ware v. Gay, 11 Pick. (Mass.) 106.

<sup>678</sup> Treadwell v. Whittier, 80 Cal. 575, 13 A. S. R. 175; Springer v. Ford, 189 Ill. 430, 52 L. R. A. 930; Goodsell v. Taylor, 41 Minn. 207, 16 A. S. R. 700.

cate that it would not have occurred if the carrier had used suitable appliances or employed competent servants to operate them.<sup>679</sup>

Q. PARENT AND CHILD.

§ 70. Issue.

A presumption is said to arise that a woman advanced in years is incapable of bearing children.<sup>680</sup> No fixed age is taken as a standard, however; and whether or not the presumption arises depends upon the circumstances of the particular case.<sup>681</sup>

<sup>679</sup> Wall v. Livezey, 6 Colo. 465; McAfee v. Huidekoper, 9 App. D. C. 36, 34 L. R. A. 720; Chicago St. R. Co. v. Rood, 163 Ill. 477, 54 A. S. R. 478; Fearn v. W. J. Ferry Co., 143 Pa. 122, 13 L. R. A. 366; Federal St. & P. V. R. Co. v. Gibson, 96 Pa. 83; Hawkins v. F. St. C. R. Co., 3 Wash. St. 592, 28 A. S. R. 72.

*Passenger injured in boarding or alighting.* Mitchell v. W. & A. R., 30 Ga. 22; Le Barron v. E. B. Ferry Co., 11 Allen (Mass.) 312, 87 A. D. 717; Joy v. Winnisimmet Co., 114 Mass. 63; Mitchell v. C. & G. T. R. Co., 51 Mich. 236, 47 A. R. 566; Chicago, St. L. & N. O. R. Co. v. Trotter, 60 Miss. 442; Olferman v. U. D. R. Co., 125 Mo. 408, 46 A. S. R. 483; Delaware, L. & W. R. Co. v. Napheys, 90 Pa. 135.

*Passenger struck by missile.* Thomas v. Phila. & R. R. Co., 148 Pa. 180, 15 L. R. A. 416; Pa. R. Co. v. MacKinney, 124 Pa. 462, 10 A. S. R. 601. And see Searles v. M. R. Co., 101 N. Y. 661 (cinder).

*Rock falling on train.* Fleming v. P., C., & St. L. R. Co., 158 Pa. 130, 38 A. S. R. 835. See, however, Gleeson v. Va. M. R. Co., 140 U. S. 435.

<sup>680</sup> In re Millner's Estate, L. R. 14 Eq. 245 (wife 49 years old). *Contra*, List v. Rodney, 83 Pa. 483 (wife 75 years old).

*Spinster over 50 years of age.* In re Widdow's Trusts, L. R. 11 Eq. 408; Maden v. Taylor, 45 Law J. Ch. 569; Davidson v. Kimpton, 18 Ch. Div. 213; Haynes v. Haynes, 35 Law J. Ch. 303; Lyddon v. Ellison, 19 Beav. 565; Edwards v. Tuck, 23 Beav. 268.

*Widow over 50 years of age.* In re Widdow's Trusts, L. R. 11 Eq. 408; White v. Edmond, 70 Law J. Ch. 300, [1901] 1 Ch. 570, 84 Law T. (N. S.) 199.

<sup>681</sup> See Application of Apgar, 37 N. J. Eq. 501.

The presumption does not apply to a woman of 54 years, who, though she has never borne children, has lived with her husband but three years last past. Croxton v. May, 9 Ch. Div. 388.



If a man who from long absence is presumed to be dead was single when last heard of, the presumption is that he died without issue;<sup>682</sup> but if he was married when last known to be alive, then no presumption against issue arises.<sup>683</sup> Nor is there any presumption that a married woman died childless.<sup>684</sup>

A presumption analogous to those just mentioned is that assuming that a particular decedent has left heirs.<sup>685</sup>

### § 71. Emancipation.

The presumption is, in the absence of evidence to the con-

The court will not indulge the presumption so as to deprive a living person of a possible interest. In *re Hocking* [1898] 2 Ch. 567.

It has been held that, regardless of evidence to the contrary, a woman will not be considered past child bearing until she is 50 years old. *Groves v. Groves*, 9 Law T. (N. S.) 533. *Contra*, In *re Millner's Estate*, L. R. 14 Eq. 245.

<sup>682</sup> *Doe d. Banning v. Griffin*, 15 East, 293; *Miller v. Beates*, 3 Serg. & R. (Pa.) 490; *Shown v. McMackin*, 9 Lea (Tenn.) 601, 42 A. R. 680. And see *McComb v. Wright*, 5 Johns. Ch. (N. Y.) 263. This is an illustration of the presumption of continuity. See § 34, *supra*.

The presumption has been indulged in cases the report of which does not show that the decedent was single when last heard of. *Rowe v. Hasland*, 1 Wm. Bl. 404; *Stinchfield v. Emerson*, 52 Me. 465, 83 A. D. 524; *Sprigg v. Moale*, 28 Md. 497, 92 A. D. 698.

<sup>683</sup> It has been held that, under these circumstances, the presumption is not against, but in favor of issue. *Faulkner's Adm'r v. Williman*, 13 Ky. L. R. 106, 16 S. W. 352. *Contra*, *Loring v. Steineman*, 1 Metc. (Mass.) 204, 211. This is, of course, true where the absentee had children when last heard of. *Campbell v. Reed*, 24 Pa. 498.

It has been held that there is no presumption against issue, even in cases the report of which does not show that the absentee was married. *Dudley v. Grayson*, 6 T. B. Mon. (Ky.) 259. And see *Hunt v. Payne*, 29 Vt. 172.

<sup>684</sup> *Hays v. Tribble*, 3 B. Mon. (Ky.) 106.

<sup>685</sup> *Pile v. McBratney*, 15 Ill. 314; *Gladson v. Whitney*, 9 Iowa, 267; *Louisville Bank v. Public School Trustees*, 83 Ky. 219; *Wilbur v. Tobey*, 16 Pick. (Mass.) 177; *University of N. C. v. Harrison*, 90 N. C. 385.

At least there is no presumption that he did not leave heirs. *Hammond's Lessee v. Inloes*, 4 Md. 138; *Emerson v. White*, 29 N. H. 482.

trary, that an infant is under the parental control. Emancipation must accordingly be proved by the person asserting it.<sup>686</sup>

## § 72. Advancements.

It is presumed that a voluntary transfer by a parent to a child is intended as an advancement to enable him to anticipate his inheritance;<sup>687</sup> and the same presumption arises where a parent purchases property in the name of the child,<sup>688</sup> or insures his own life in the child's name, or in his own name and

<sup>686</sup> *Fitzwilliam v. Troy*, 6 N. H. 166.

<sup>687</sup> *Fennell v. Henry*, 70 Ala. 484, 45 A. R. 88; *Hatch v. Straight*, 3 Conn. 31, 8 A. D. 152; *Grattan v. Grattan*, 18 Ill. 167, 65 A. D. 726; *Scott v. Harris*, 127 Ind. 520; *Culp v. Willson*, 133 Ind. 294; *Finch v. Garrett*, 102 Iowa, 381; *Hattersley v. Bissett*, 51 N. J. Eq. 597, 40 A. S. R. 532.

The presumption applies where the parent gives money to the child. *Higham v. Vanosdol*, 125 Ind. 74; *St. Louis Trust Co. v. Rudolph*, 136 Mo. 169; *Weaver's Appeal*, 63 Pa. 309. The presumption may arise also where a father conveys property to his daughter's husband. It is deemed an advancement to her. *Stevenson v. Martin*, 11 Bush (Ky.) 485. And see *James v. James*, 41 Ark. 301; *Towles v. Roundtree*, 10 Fla. 299; *Baker v. Leathers*, 3 Ind. 558; *Haglar v. McCombs*, 66 N. C. 345, 350. *Contra*, *Rains v. Hays*, 6 Lea (Tenn.) 303, 40 A. R. 39.

The presumption does not arise where the transfer takes the form of a conveyance for full value. *Miller's Appeal*, 107 Pa. 221.

<sup>688</sup> *Bogy v. Roberts*, 48 Ark. 17, 3 A. S. R. 211; *Higham v. Vanosdol*, 125 Ind. 74; *Lisloff v. Hart*, 25 Miss. 245, 57 A. D. 203; *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Phillips v. Gregg*, 10 Watts (Pa.) 158, 36 A. D. 153; *Kern v. Howell*, 180 Pa. 315, 57 A. S. R. 641; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9, 51 A. D. 690; *Smith v. Strahan*, 16 Tex. 314, 67 A. D. 622.

It has been held that this presumption does not apply to a purchase so made by a mother, since she is not regarded as being under any obligation to make provision for her children. *Bennet v. Bennet*, 10 Ch. Div. 474.

Where a life tenant whose children are the remaindermen buys in the estate at a trust-deed sale, the presumption is that he does so by way of advancement, and the remainder does not vest in him absolutely. *Allen v. De Groodt*, 98 Mo. 159, 14 A. S. R. 626.

assigns the policy to the child,<sup>689</sup> or pays a debt due from the child to a third person.<sup>690</sup> The presumption does not arise, however, where an evidence of indebtedness is given by the child or preserved by the parent;<sup>691</sup> nor where, at the time of the transfer, the parent was indebted to the child;<sup>692</sup> and money expended by the parent to educate the child is not presumed to be an advancement.<sup>693</sup>

The presumption in favor of advancements is not conclusive, but rebuttable.<sup>694</sup>

### § 73. Services and support.

If goods are furnished or services are performed, though without previous order, and they are accepted, a presumption is said to arise, ordinarily, that the beneficiary intended to pay for them.<sup>695</sup> The relationship existing between the parties is

<sup>689</sup> *Cazassa v. Cazassa*, 92 Tenn. 573, 36 A. S. R. 112.

<sup>690</sup> *Johnson v. Hoyle*, 3 Head (Tenn.) 56.

<sup>691</sup> *Fennell v. Henry*, 70 Ala. 484, 45 A. R. 88; *Cutliff v. Boyd*, 72 Ga. 302; *Harley v. Harley*, 57 Md. 340; *Miller's Appeal*, 40 Pa. 57, 80 A. D. 555.

It is competent to show that an advancement was nevertheless intended. *Cutliff v. Boyd*, *supra*.

<sup>692</sup> *Haglar v. McCombs*, 66 N. C. 345.

An intention to make an advancement under these circumstances may nevertheless be shown. *Haglar v. McCombs*, *supra*.

<sup>693</sup> *Fennell v. Henry*, 70 Ala. 484, 45 A. R. 88 (statute); *Miller's Appeal*, 40 Pa. 57, 80 A. D. 555; *White v. Moore*, 23 S. C. 456.

<sup>694</sup> *Fennell v. Henry*, 70 Ala. 484, 45 A. R. 88; *Hatch v. Straight*, 3 Conn. 31, 8 A. D. 152; *Bay v. Cook*, 31 Ill. 336; *Hall v. Hall*, 107 Mo. 101; *Hattersley v. Bissett*, 51 N. J. Eq. 597, 40 A. S. R. 532; *Jackson v. Matsdorf*, 11 Johns. (N. Y.) 91, 6 A. D. 355; *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Dudley v. Bosworth*, 10 Humph. (Tenn.) 9, 51 A. D. 690; *Johnson v. Hoyle*, 3 Head (Tenn.) 56; *Smith v. Strahan*, 16 Tex. 314, 67 A. D. 622; *Watkins v. Young*, 31 Grat. (Va.) 84.

<sup>695</sup> This is nothing but a rule of substantive law. In other words, the rendition and acceptance of services, or the furnishing of goods, creates an implied contract to pay for them. *Hammon*, Cont. §§ 48-57;

an important factor in determining whether a contract may be so implied to pay for services rendered or support furnished. As between parent and child, a contract to pay for the benefits received will not ordinarily be implied; they are presumed to have been conferred gratuitously.<sup>696</sup> The same is true where the parties, though not in fact such, stand in the relation of parent and child.<sup>697</sup> The rule is also applied as between more distant relatives,<sup>698</sup> and in many courts even as between persons not related,<sup>699</sup> where they occupy the position of members of the same family, and the benefits for which a recovery is sought relate to the family connection. It should be borne in mind, however, that the presumption against the existence of

*Kinney v. S. & N. A. R. Co.*, 82 Ala. 368; *Day v. Caton*, 119 Mass. 513, 20 A. R. 347; *McClary v. Mich. Cent. R. Co.*, 102 Mich. 312; *Rosenfield v. Swenson*, 45 Minn. 190; *Ind. Mfg. Co. v. Hayes*, 155 Pa. 160.

<sup>696</sup> *Cohen v. Cohen's Ex'r*, 2 Mackey (D. C.) 227; *Bradley v. Kent's Ex'r*, 7 Houst. (Del.) 372; *Hudson v. Hudson*, 90 Ga. 581; *Cowan v. Musgrave*, 73 Iowa, 384; *Perry v. Perry*, 2 Duv. (Ky.) 312; *Bantz v. Bantz*, 52 Md. 686; *Howe v. North*, 69 Mich. 272; *Erhart v. Dietrich*, 118 Mo. 418; *Kloke v. Martin*, 55 Neb. 554; *Heywood v. Brooks*, 47 N. H. 231; *Young v. Herman*, 97 N. C. 280; *Houck's Ex'rs v. Houck*, 99 Pa. 552; *Hatch v. Hatch's Estate*, 60 Vt. 160; *Andrus v. Foster*, 17 Vt. 556; *Pellage v. Pellage*, 32 Wis. 136; *Long, Dom. Rel.* 325.

<sup>697</sup> *Larsen v. Hansen*, 74 Cal. 320; *Stock v. Stoltz*, 137 Ill. 349; *King's Adm'r v. Kelly*, 28 Ind. 89; *Wyley v. Bull*, 41 Kan. 206; *Harris v. Smith*, 79 Mich. 54; *Gillett v. Camp*, 27 Mo. 541; *Williams v. Hutchinson*, 3 N. Y. 312, 53 A. D. 301; *Hudson v. Lutz*, 50 N. C. (5 Jones) 217; *Ormsby v. Rhoades*, 59 Vt. 505; *Ellis v. Cary*, 74 Wis. 176, 17 A. S. R. 125.

<sup>698</sup> *Davies v. Davies*, 9 Car. & P. 87; *State v. Connaway*, 2 Houst. (Del.) 206; *Heffron v. Brown*, 155 Ill. 322; *Oxford v. McFarland*, 3 Ind. 156; *Weir v. Weir's Adm'r*, 3 B. Mon. (Ky.) 645, 39 A. D. 487; *Shepherd v. Young*, 8 Gray (Mass.) 152, 69 A. D. 242; *Collyer v. Collyer*, 113 N. Y. 442; *Wilkes v. Cornelius*, 21 Or. 341; *Hall v. Finch*, 29 Wis. 278, 9 A. R. 559.

<sup>699</sup> *Collar v. Patterson*, 137 Ill. 403; *Medsker v. Richardson*, 72 Ind. 323; *Windland v. Deeds*, 44 Iowa, 98; *Cooper v. Cooper*, 147 Mass. 370, 9 A. S. R. 721; *Feiertag v. Feiertag*, 73 Mich. 297; *Schaedel v. Reibolt*, 33 N. J. Eq. 534; *Gerz v. Weber*, 151 Pa. 396; *Schrumpf v. Settegast*, 36 Tex. 296.

a contract in these cases is not conclusive. It may be rebutted by evidence of circumstances showing that the parties mutually intended that compensation should be made.<sup>700</sup>

#### R. PAYMENT.

§ 74. Payment is an affirmative defense, and the burden of proving it lies on the defendant.<sup>701</sup> The defendant is some-

<sup>700</sup> *Morton v. Rainey*, 82 Ill. 215, 25 A. R. 311; *Huffman v. Wyrick*, 5 Ind. App. 183; *Thurston v. Perry*, 130 Mass. 240; *Donahue v. Donahue*, 53 Minn. 460; *Kloke v. Martin*, 55 Neb. 554; *Ulrich v. Ulrich*, 136 N. Y. 120, 18 L. R. A. 37; *Briggs v. Briggs' Estate*, 46 Vt. 571.

<sup>701</sup> UNITED STATES: *Simonton v. Winter*, 5 Pet. 141, 149.

ALABAMA: *Sampson v. Fox*, 109 Ala. 662, 55 A. S. R. 950; *Brown v. Scott*, 87 Ala. 453.

ARKANSAS: *Caldwell v. Hall*, 49 Ark. 508, 4 A. S. R. 64.

COLORADO: *Lovelock v. Gregg*, 14 Colo. 53; *Perot v. Cooper*, 17 Colo. 80, 31 A. S. R. 258.

ILLINOIS: *De Land v. Dixon Nat. Bank*, 111 Ill. 323.

INDIANA: *Kent v. White*, 27 Ind. 390.

KANSAS: *First Nat. Bank v. Hellyer*, 53 Kan. 695, 42 A. S. R. 316; *Guttermann v. Schroeder*, 40 Kan. 507.

KENTUCKY: *Harris v. Merz A. I. Works*, 82 Ky. 200; *Powell v. Swan's Adm'r*, 5 Dana, 1.

LOUISIANA: *Gernon v. McCan*, 23 La. Ann. 84.

MICHIGAN: *Thatcher v. Hayes*, 54 Mich. 184; *Smith's Appeal*, 52 Mich. 415.

NEBRASKA: *Tootle v. Maben*, 21 Neb. 617.

NEW HAMPSHIRE: *Kendall v. Brownson*, 47 N. H. 186.

PENNSYLVANIA: *North Pa. R. Co. v. Adams*, 54 Pa. 94, 93 A. D. 677.

TENNESSEE: *Mason v. Spurlock*, 4 Baxt. 554; *Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 A. S. R. 769.

UTAH: *McCornick v. Sadler*, 11 Utah, 444.

VERMONT: *Terryberry v. Woods*, 69 Vt. 94.

WISCONSIN: *Knapp v. Runals*, 37 Wis. 135.

And see *Woodson Mach. Co. v. Morse*, 47 Kan. 429; *Hutchins v. Hamilton*, 34 Tex. 290. See, however, *Lent v. N. Y. & M. R. Co.*, 130 N. Y. 504. And see, generally, 6 Current Law, 992.

If, however, a regular course of dealing between a master and servant is proved, by which the servant, without taking a receipt, customarily paid over to the master funds received to his use, the burden is on the

times relieved from this burden, however, by the operation of certain presumptions.

§ 75. Lapse of time.

(a) **General rule.** Whether a debt rests upon a record, a writing under seal, a parol writing, or mere word of mouth, payment of the demand is presumed, at common law, by courts of common-law as well as those of equitable jurisdiction, from the lapse of twenty years from the time of its maturity, if the debtor has not, in the meantime, recognized the debt as a valid and subsisting obligation, and the creditor's long delay before attempting to enforce the demand is not explained.<sup>702</sup> Unlike

master, in an action for money received, to show that the particular sums demanded were not paid over to him. *Evans v. Birch*, 3 Camp. 10.

In California, if the maker of a note denies nonpayment, the plaintiff must produce the note or account for its absence, else the burden of showing nonpayment is on him. *Turner v. Turner*, 79 Cal. 565.

If money is delivered to one person to be applied to the use of another, and the depositor afterwards sues the mandatary to recover it back, the burden of proof is on the latter to show that he had applied the fund as directed before the order was countermanded. *Thweatt v. McCullough*, 84 Ala. 517, 5 A. S. R. 391.

If the debtor pays to one other than the creditor, the burden is on him, as against the creditor, to show authority on the part of the payee to receive the money. *Lehman v. McQueen*, 65 Ala. 570.

<sup>702</sup> *Coleman v. Lane*, 26 Ga. 515; *Kingsland v. Roberts*, 2 Paige (N. Y.) 193.

*Bond.* *Oswald v. Legh*, 1 Term R. 270; *Miller v. Evans*, 2 Cranch, C. C. 72, Fed. Cas. No. 9,569; *Harrison v. Haplin*, 54 Ala. 552; *Durham v. Greenly*, 2 Har. (Del.) 124; *Boyd v. Harris*, 2 Md. Ch. 210; *Rogers v. Bishop*, 5 Blackf. (Ind.) 108; *Smith's Ex'r v. Benton*, 15 Mo. 371; *Buchanan v. Rowland*, 5 N. J. Law, 721; *Lash v. Von Neida*, 109 Pa. 207; *Langston v. Shands*, 23 S. C. 149; *Booker's Adm'r v. Booker's Rep.*, 29 Grat. (Va.) 605, 26 A. R. 401; *Norwell v. Little*, 79 Va. 141; *Hale v. Pack's Ex'rs*, 10 W. Va. 145.

*Corporate subscription.* *Semple v. Glenn*, 91 Ala. 245, 24 A. S. R. 894.

*Judgment.* *Gaines v. Miller*, 111 U. S. 395, 399; *Barber v. International Hammon, Ev.*—20.

the statute of limitations, the presumption of payment applies

tional Co., 74 Conn. 652, 92 A. S. R. 246; Boardman v. De Forest, 5 Conn. 1; Morrow v. Robinson, 4 Del. Ch. 521; Farmers' Bank v. Leonard, 4 Har. (Del.) 536; Burt v. Casey, 10 Ga. 178; Gullick v. Loder, 13 N. J. Law, 68, 23 A. D. 711; Bird's Adm'r v. Inslee's Ex'rs, 23 N. J. Eq. 363; Miller v. Smith's Ex'rs, 16 Wend. (N. Y.) 425; Beekman v. Hamlin, 19 Or. 383, 20 A. S. R. 827; Hummel v. Lilly, 188 Pa. 463, 68 A. S. R. 879; Breneman's Appeal, 121 Pa. 641; Kinsler v. Holmes, 2 Rich. (S. C.) 483.

*Land contract debt.* McCormick v. Evans, 33 Ill. 327; Morrison v. Funk, 23 Pa. 421. On an issue whether a grantee purchased for value, the presumption of payment operates in aid of a receipt of the grantor that the price has been paid. Pryor v. Wood, 31 Pa. 142.

*Legacy.* Greenlees v. Greenlees, 62 Ala. 330; Bonner v. Young, 68 Ala. 35; Wooten v. Harrison, 9 La. Ann. 234; Andrews v. Sparhawk, 13 Pick. (Mass.) 393; Hayes v. Whittall, 13 N. J. Eq. 241; Cox v. Brower, 114 N. C. 422; Foulk v. Brown, 2 Watts (Pa.) 209. And see Hooper v. Howell, 52 Ga. 315. *Contra*, Main v. Brown, 72 Tex. 505, 13 A. S. R. 823.

*Mortgage debt.* Sweetser v. Lowell, 33 Me. 446; Jarvis v. Albrow, 67 Me. 310; Kellogg v. Dickinson, 147 Mass. 432, 1 L. R. A. 346; Howland v. Shurtleff, 2 Metc. (Mass.) 26, 35 A. D. 384; Tripe v. Marcy, 39 N. H. 439, 448; Downs v. Sooy, 28 N. J. Eq. 55; Olden v. Hubbard, 34 N. J. Eq. 85; Jackson v. Wood, 12 Johns. (N. Y.) 242, 7 A. D. 315; Agnew v. Renwick, 27 S. C. 562; King v. King, 90 Va. 177; Bowie v. Poor School Soc., 75 Va. 300; Criss v. Criss, 28 W. Va. 388.

*Note.* Daggett v. Tallman, 8 Conn. 168; Clark v. Clement, 33 N. H. 563; Boyce v. Lake, 17 S. C. 481, 43 A. R. 618; White v. Moore, 23 S. C. 456.

*Recognizance.* Ankeny v. Penrose, 18 Pa. 190; Gregory v. Com., 121 Pa. 611, 6 A. S. R. 804.

*Rent.* Lyon v. Odell, 65 N. Y. 28; Bailey v. Jackson, 16 Johns. (N. Y.) 210, 8 A. D. 309. Nonpayment of rent for twenty years does not, however, raise a presumption that the covenant to pay rent has been released and discharged. Lyon v. Odell, 65 N. Y. 28.

*Trust.* Philippi v. Philippe, 115 U. S. 151; McCarthy v. McCarthy, 74 Ala. 546. And see Prevost v. Gratz, 6 Wheat. (U. S.) 481; Drysdale's Appeal, 14 Pa. 531; Webb v. Dean, 21 Pa. 29; Strimpfner v. Roberts, 18 Pa. 283, 57 A. D. 606. *Contra*, Williams v. Williams, 82 Wis. 393. Presumption of conveyance by trustee to beneficiary, see page 348, *infra*.

The presumption may arise, also, where the debt is payable in property. Phillips v. Morrison, 3 Bibb (Ky.) 105, 6 A. D. 638.

The presumption operates in favor of the debtor, whether he alleges

against the state, the same as against individual creditors.<sup>703</sup> The presumption applies not only in favor of the debtor, but also in favor of his creditors;<sup>704</sup> and, on the other hand, it applies not only against the holder of the obligation, but also against his creditors.<sup>705</sup>

(b) **Period of delay.** In the absence of statute to the contrary, the presumption of payment does not arise from mere lapse of time, unless the full period of twenty years has expired, so that if suit is brought on the debt within that period the burden of proof as to payment rests on the debtor.<sup>706</sup> In combination with other circumstances, however, lapse of time

payment generally or payment by the giving of a negotiable instrument. *Manning v. Meredith*, 69 Iowa, 430.

It has been doubted that lapse of time may raise a presumption of payment by way of set-off. *Adair v. Adair*, 5 Mich. 204, 71 A. D. 779, 784.

It has been held that the presumption of payment arising from mere lapse of time may be used only as a shield, and not as a weapon of attack, so that a party asking affirmative equitable relief on the ground that he has paid a debt must establish the fact of payment by affirmative evidence, mere lapse of time being insufficient. *Morey v. Farmers' L. & T. Co.*, 14 N. Y. 302; *Allen v. Everly*, 24 Ohio St. 97.

Length of time may be set up to show that no debt ever existed as well as to show payment. *Christophers v. Sparke*, 2 Jac. & W. 223; *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685, 23 A. D. 748.

<sup>703</sup> *In re Ash's Estate*, 202 Pa. 422, 90 A. S. R. 658.

This is true in collateral proceedings between individuals. *Andover v. Merrimack County*, 37 N. H. 437; *Elliott v. Williamson*, 11 Lea (Tenn.) 38.

<sup>704</sup> *Van Loon v. Smith*, 103 Pa. 238.

<sup>705</sup> *Semple v. Glenn*, 91 Ala. 245, 24 A. S. R. 894.

<sup>706</sup> *Colsell v. Budd*, 1 Camp. 27; *Phillips v. Adams*, 78 Ala. 225; *Cottle v. Payne*, 3 Day (Conn.) 289; *Stockton's Adm'r v. Johnson*, 6 B. Mon. (Ky.) 408; *Thayer v. Mowry*, 36 Me. 287; *West v. Brison*, 99 Mo. 684; *Gould v. White*, 26 N. H. 178; *Daby v. Ericsson*, 45 N. Y. 786; *Morrison v. Collins*, 127 Pa. 28, 14 A. S. R. 827; *Murphy v. Phila. Trust Co.*, 103 Pa. 379; *Henderson v. Lewis*, 9 Serg. & R. (Pa.) 379, 11 A. D. 733; *Smithpeter v. Ison's Adm'rs*, 4 Rich. Law (S. C.) 203, 53 A. D. 732; *Norvell v. Little*, 79 Va. 141; *Calwell's Ex'r v. Prindle's Adm'r*, 19 W.



for a less period than twenty years from the time the debt matured may justify an inference of payment.<sup>707</sup> The quantity of evidence required to justify this inference, where the lapse of time has not reached twenty years, depends in a measure upon the extent to which that time has elapsed. If but a few years have gone by since the debt matured, the additional circumstances tending to show payment must be cogent and satisfactory. On the other hand, if the twenty years has well

Va. 604; *Sadler's Adm'r v. Kennedy's Adm'r*, 11 W. Va. 187. See, however, *Jackson v. Sackett*, 7 Wend. (N. Y.) 94.

In some states, and in reference to some debts, the lapse of a less time than twenty years gives rise to the presumption of law. *Didlake v. Robb*, 1 Woods, 680, Fed. Cas. No. 3,899; *Rector v. Morehouse*, 17 Ark. 131; *Woodruff v. Sanders*, 15 Ark. 143; *Clark's Ex'rs v. Hopkins*, 7 Johns. (N. Y.) 556; *Hall v. Gibbs*, 87 N. C. 4; *Long v. Clegg*, 94 N. C. 763; *Rogers v. Clements*, 98 N. C. 180; *Smith v. Niagara F. Ins. Co.*, 60 Vt. 682, 6 A. S. R. 144 (semble). And see *Wood v. Egan*, 39 La. Ann. 684. In Tennessee, a presumption of fact may arise from mere lapse of time alone, where sixteen years have expired; that is, where that time has expired, the jury may infer payment. *Blackburn v. Squibb, Peck* (Tenn.) 59; *Atkinson v. Dance*, 9 Yerg. (Tenn.) 424, 30 A. D. 422; *Kilpatrick v. Brashear*, 10 Heisk. (Tenn.) 372.

The twenty years' period does not begin to run until the maturity of the obligation. *Tripe v. Marcy*, 39 N. H. 439, 449; *Smith v. Niagara F. Ins. Co.*, 60 Vt. 682, 6 A. S. R. 144. And see page 312, *infra*. But if a debt is due in installments, the twenty years' period commences to run as to each instalment as it falls due. *State v. Lobb's Adm'r*, 3 Har. (Del.) 421.

A presumption of payment to heirs does not arise in favor of an administrator who owes the estate individually until twenty years have elapsed from the passing of a decree of distribution. *Potter v. Titcomb*, 7 Me. 302.

<sup>707</sup> *Denniston v. McKeen*, 2 McLean, 253, Fed. Cas. No. 3,803; *Fleming v. Rothwell*, 5 Har. (Del.) 46; *Garnier v. Renner*, 51 Ind. 372; *Long v. Straus*, 124 Ind. 84; *West v. Brison*, 99 Mo. 684; *Gould v. White*, 26 N. H. 178; *Briggs' Appeal*, 93 Pa. 485; *Brubaker's Adm'r v. Taylor*, 76 Pa. 83; *Moore v. Smith*, 81 Pa. 182; *Kinsler v. Holmes*, 2 Rich. (S. C.) 483, 496; *Blake's Ex'rs v. Quash's Ex'rs*, 3 McCord (S. C.) 340; *Norvell v. Little*, 79 Va. 141; *Sadler's Adm'r v. Kennedy's Adm'r*, 11 W. Va. 187; *Calwell's Ex'r v. Prindle's Adm'r*, 19 W. Va. 604.

nigh expired, payment may be inferred from this and additional circumstances of slight weight.<sup>708</sup> The character of these circumstances the law does not attempt to define. Each case depends upon its own peculiar facts, and the question of payment under the evidence is one of fact, unaffected by any presumption of law.<sup>709</sup> The fact that the creditor is ordinarily strict in the collection of his debts; that he has been in needy circumstances during the delay; that the debtor is ordinarily prompt in his payments; that he has been solvent during the delay,—these things, collectively or in various combinations, taken in connection with a delay of less than twenty years, are examples of what may be regarded as sufficient to justify an inference that the debt has been paid.<sup>710</sup>

(c) **Rebuttal.** The presumption of payment arising from lapse of twenty years is not conclusive, but disputable. Its effect, and its only effect, is to make a *prima facie* case in favor of the debtor as to the fact of payment, and to cast on the creditor the burden of showing the contrary.<sup>711</sup> The quan-

<sup>708</sup> *King's Ex'r v. Coulter's Ex'r*, 2 Grant Cas. (Pa.) 77; *Hughes v. Hughes*, 54 Pa. 240.

<sup>709</sup> *Long v. Straus*, 124 Ind. 84; *Henderson v. Lewis*, 9 Serg. & R. (Pa.) 379, 11 A. D. 733; *Diamond v. Tobias*, 12 Pa. 312.

<sup>710</sup> *May v. Wilkinson*, 76 Ala. 543; *Phillips v. Adams*, 78 Ala. 225; *Milledge v. Gardner*, 33 Ga. 397; *Morrison v. Collins*, 127 Pa. 28, 14 A. S. R. 827; *Hughes v. Hughes*, 54 Pa. 240; *Leiper v. Erwin*, 5 Yerg. (Tenn.) 97; *Husky v. Maples*, 2 Cold. (Tenn.) 25, 88 A. D. 588; *Bender v. Montgomery*, 8 Lea (Tenn.) 586 (semble).

The single circumstance that the debtor has been continuously solvent will not justify an inference of payment if twenty years has not elapsed. *Daby v. Ericsson*, 45 N. Y. 786; *Morrison v. Collins*, 127 Pa. 28, 14 A. S. R. 827.

The creditor's need of money, and the debtor's ability to pay, coupled with a lapse of sixteen years without demand of payment, do not justify an inference of payment, where the creditor still has possession of the evidence of indebtedness. *Smithpeter v. Ison's Adm'rs*, 4 Rich. Law (S. C.) 203, 53 A. D. 732.

<sup>711</sup> *Burt v. Casey*, 10 Ga. 178; *Helm's Ex'rs v. Jones' Adm'x*, 3 Dana

tity of evidence required to overcome the presumption is not fixed by law. It varies with the particular case. Generally speaking, the evidence must be clear and convincing, and sufficient to satisfy the jury that the debt has not been paid.<sup>712</sup>

It has been held that, to rebut the presumption, the creditor must prove such facts as are required to take a case out of the operation of the statute of limitations;<sup>713</sup> that is to say, the creditor must show that within twenty years of bringing suit the debtor promised to pay the debt, or either acknowledged it as a valid and subsisting obligation or paid something on account of it, under circumstances consistent with an intention subsequently to discharge the debt or the balance due. By the weight of authority, however, this rule does not prevail. While it is true that the presumption is rebutted by an acknowledgment,<sup>714</sup> or a part payment,<sup>715</sup> or a new prom-

(Ky.) 86; *Jarvis v. Albro*, 67 Me. 310; *Sweetser v. Lowell*, 33 Me. 446; *Baent v. Kennicutt*, 57 Mich. 268; *Lewis v. Schwenn*, 93 Mo. 26, 3 A. S. R. 511; *Barker v. Jones*, 62 N. H. 497, 13 A. S. R. 586; *Hayes v. Whittall*, 13 N. J. Eq. 241; *Ankeny v. Penrose*, 18 Pa. 190; *Morrison v. Funk*, 23 Pa. 421; *Burnside v. Donnon*, 34 S. C. 289; *Norvell v. Little*, 79 Va. 141. *Contra*, *Didlake v. Robb*, 1 Woods, 680, Fed. Cas. No. 3,899.

<sup>712</sup> *Cowle v. Fisher*, 45 Mich. 629; *Jackson v. Wood*, 12 Johns. (N. Y.) 242, 7 A. D. 315; *Lowe v. Lowell*, 49 N. C. (4 Jones) 235; *Gregory v. Com.*, 121 Pa. 611, 6 A. S. R. 804.

<sup>713</sup> *Latimer v. Trowbridge*, 52 S. C. 193, 68 A. S. R. 893; *Boyce v. Lake*, 17 S. C. 481, 43 A. R. 618; *Stover v. Duren*, 3 Strob. (S. C.) 448, 51 A. D. 634.

The presumption can be rebutted only by some positive act of unequivocal recognition of the debt by the debtor within the twenty years' period. *Cheever v. Perley*, 11 Allen (Mass.) 584; *Lyon v. Adde*, 63 Barb. (N. Y.) 89; *Beekman v. Hamlin*, 19 Or. 383, 20 A. S. R. 827.

<sup>714</sup> *Werborn v. Austin*, 82 Ala. 498; *Abbott v. Godfroy's Heirs*, 1 Mich. 178; *Murphy v. Coates*, 33 N. J. Eq. 424; *Tucker v. Baker*, 94 N. C. 162; *Bissell v. Jaudon*, 16 Ohio St. 498; *Breneman's Appeal*, 121 Pa. 641; *McQueen v. Fletcher*, 4 Rich. Eq. (S. C.) 152; *Fisher v. Phillips*, 4 Baxt. (Tenn.) 243.

An admission sufficient to rebut the presumption may be made either

ise,<sup>716</sup> if made within the twenty years' period, yet these are not the only facts that will repel it. On the contrary, the

to the creditor, to his agent, or to a third person. *Burton v. Cannon*, 5 Har. (Del.) 13; *Gregory v. Com.*, 121 Pa. 611, 6 A. S. R. 804. An admission will not be as readily implied from language casually addressed to a stranger as when addressed to the creditor in reply to a demand for the debt, however. *Gregory v. Com.*, *supra*.

If the state is the debtor, an acknowledgment sufficient to rebut the presumption may be made by a proper state officer. *Jackson v. Pierce*, 10 Johns. (N. Y.) 414.

An admission of the deceased debtor's administrator that he himself had not paid the debt does not rebut the presumption where the administration did not extend over the full period necessary to found the presumption. *Grant v. Gooch*, 105 N. C. 278. Nor does an acknowledgment of the debt made by the personal representative of the deceased debtor rebut the presumption as against a surety of the debtor. *Harrison v. Heflin*, 54 Ala. 552.

Acknowledgment by an heir of the deceased debtor does not rebut the presumption as against the decedent's estate. *Blake's Ex'rs v. Quash's Ex'rs*, 3 McCord (S. C.) 340.

An admission of nonpayment dispels the presumption, even though it was accompanied by the expression of a purpose not to pay. *Gregory's Ex'rs v. Com.*, 121 Pa. 611, 6 A. S. R. 804. The rule as to this is otherwise in South Carolina, where the presumption can be defeated only by proof of such facts as would take a case out of the statute of limitations. *Stover v. Duren*, 3 Strob. (S. C.) 448, 51 A. D. 634. See page 310, *supra*.

It has been held that a mere acknowledgment that the debt has not been paid, if made after the lapse of twenty years from the time the debt matured, is not sufficient to rebut the presumption of payment. *Stover v. Duren*, 3 Strob. (S. C.) 448, 51 A. D. 634. The rule is otherwise, however, if the acknowledgment is made before the lapse of twenty years from the time that the debt matures, and within twenty years from the time suit is brought. *Roberts v. Smith*, 21 S. C. 455.

<sup>716</sup> *Burton v. Cannon*, 5 Har. (Del.) 13; *Bissell v. Jaudon*, 16 Ohio St. 498; *Hale v. Pack's Ex'rs*, 10 W. Va. 145, 152 (semble).

Part payment by the debtor's personal representative within the twenty years' period destroys the presumption of payment. *Girard v. Futterer*, 84 Ala. 323. *Contra*, *Didlake v. Robb*, 1 Woods, 680, Fed. Cas. No. 3,899. And the same is true of a part payment made by the debtor's assignee in bankruptcy. *Belo v. Spach*, 85 N. C. 122. Part payment

presumption is dispelled, not only by these facts, but also by any others which tend to show that the debt is in fact unpaid.<sup>717</sup>

Among the various facts which have been held to explain away the presumption may be mentioned the fact that the creditor has extended the time of payment, and that twenty

by heirs or devisees of the deceased debtor does not destroy the presumption of payment arising in favor of his estate, however. *Gibson v. Lowndes*, 28 S. C. 285.

Part payment by one of several joint and several debtors rebuts the presumption as against all. *Hall v. Woodward*, 26 S. C. 557; *Dickson v. Gourdin*, 29 S. C. 343. If, however, a joint and several debtor dies, the obligation is severed, and subsequent part payments by the survivor do not keep the debt alive as against the estate of the decedent. *Shubrick v. Adams*, 20 S. C. 49. And see *Langston v. Shands*, 23 S. C. 149.

Credits indorsed on a bond are not evidence of actual payments without a showing that they were so indorsed within the twenty years' period. *Runner's Appeal*, 121 Pa. 649. This fact being shown, indorsements of credits are evidence of payments. *White v. Beaman*, 96 N. C. 122. An indorsement of credit by work done does not defeat the presumption, however, unless made with the debtor's privity. *Kirkpatrick's Ex'r v. Langphier*, 1 Cranch, C. C. 85, Fed. Cas. No. 7,849.

If twenty years has elapsed since a part payment was made, the presumption of payment arises the same as if no part payment had been made. *Courtney v. Staudenmeyer*, 56 Kan. 392, 54 A. S. R. 592.

<sup>716</sup> *Tucker v. Baker*, 94 N. C. 162.

<sup>717</sup> *Hopkirk v. Page*, 2 Brock. 20, Fed. Cas. No. 6,697; *Shields v. Pringle*, 2 Bibb (Ky.) 387; *Abbott v. Godfroy's Heirs*, 1 Mich. 178; *Grantham v. Canaan*, 38 N. H. 268; *Clark v. Clement*, 33 N. H. 563; *Long v. Clegg*, 94 N. C. 763; *Allen v. Everly*, 24 Ohio St. 97; *Reed v. Reed*, 46 Pa. 239; *Gregory's Ex'rs v. Com.*, 121 Pa. 611, 6 A. S. R. 804; *Elliott v. Williamson*, 11 Lea (Tenn.) 38; *Bowie v. Poor School Soc.*, 75 Va. 300; *Jameson v. Rixey*, 94 Va. 342, 64 A. S. R. 726; *Hale v. Pack's Ex'rs*, 10 W. Va. 145; *Criss v. Criss*, 28 W. Va. 388.

The evidence of nonpayment relied on in rebuttal must in many cases be directed to the entire period of the lapse of time, else it will not defeat the presumption. *Rowland v. Windley*, 86 N. C. 36.

The fact that the creditor has possession of the evidence of indebtedness may rebut the presumption of payment. *Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 A. S. R. 769. See § 89(a), *infra*.

years has not elapsed since the debt matured;<sup>718</sup> the fact that some legal impediment has existed during a part of the twenty years to prevent the creditor from enforcing his claim;<sup>719</sup> the

<sup>718</sup> Hale v. Pack's Ex'rs, 10 W. Va. 145.

<sup>719</sup> Crooker v. Crooker, 49 Me. 416; Criss v. Criss, 28 W. Va. 388.

*Alienage and war.* Dunlop v. Ball, 2 Cranch (U. S.) 184; Bailey v. Jackson, 16 Johns. (N. Y.) 210, 8 A. D. 309.

*War interrupting courts.* McLellan v. Crofton, 6 Me. 307, 334 (semble); Bender v. Montgomery, 8 Lea (Tenn.) 586; Hale v. Pack's Ex'rs, 10 W. Va. 145. However, the period of the existence of a stay law in the state of the forum during the Civil War is not to be deducted from the twenty years' period, so as to defeat the presumption of payment. Harrison v. Heflin, 54 Ala. 552; Shubrick v. Adams, 20 S. C. 49; Boyce v. Lake, 17 S. C. 481, 43 A. R. 618; Kilpatrick v. Brashear, 10 Heisk. (Tenn.) 372. *Contra*, Gwyn v. Porter, 5 Heisk. (Tenn.) 253. And see Penrose v. King, 1 Yeates (Pa.) 344.

The rule in regard to the statute of limitations, that when time has begun to run it suffers no interruption from an intervening disability, does not apply to the presumption of payment under discussion. Abbott v. Godfroy's Heirs, 1 Mich. 178 (semble); Bailey v. Jackson, 16 Johns. (N. Y.) 210, 8 A. D. 309; Foulk v. Brown, 2 Watts (Pa.) 209 (semble). *Contra*, Semple v. Glenn, 91 Ala. 245, 24 A. S. R. 894, 903 (semble); Shubrick v. Adams, 20 S. C. 49.

The presumption is not rebutted by the fact that a preliminary injunction issued against the creditor on a bill to set aside a judgment obtained on his claim, where he did not answer the bill nor move to dissolve the injunction for more than twenty years after. Buchanan v. Rowland, 5 N. J. Law, 721.

The imprisonment of either party during the twenty years' period, or a part of it, does not rebut the presumption of payment unless, perhaps, the circumstances of the imprisonment were such as to prevent the institution or prosecution of a suit. Rogers v. Judd, 5 Vt. 236, 26 A. D. 301.

Infancy, coverture, or lunacy of the creditor during a part of the twenty years' period does not rebut the presumption. McCartney's Adm'r v. Bone, 40 Ala. 533; Boyce v. Lake, 17 S. C. 481, 43 A. R. 618. However this may be in New Hampshire, if the creditor is under age when the debt matures, and twenty years subsequently elapse, it seems that payment will be presumed in five years after he attains his majority. Bartlett v. Bartlett, 9 N. H. 398.

Poverty of the creditor does not defeat the presumption unless it is

fact that the debtor has been absent from the state,<sup>720</sup> or that his residence was unknown to the creditor,<sup>721</sup> during a portion of the twenty years' period; the fact that the debtor has been insolvent during the greater part of the twenty years,<sup>722</sup> or

such as to deprive him of all power to sue during the twenty years, or the greater portion of that time. *Rogers v. Judd*, 5 Vt. 236, 26 A. D. 301. Poverty of debtor, see note 722, *infra*.

The time elapsing between the death of the creditor and the appointment of an administrator of his estate is not to be deducted from the twenty years' period (*Cox v. Brower*, 114 N. C. 422; *Foulk v. Brown*, 2 Watts [Pa.] 209), unless the debtor shows that the debt matured before the creditor died (*Abbott v. Godfroy's Heirs*, 1 Mich. 178 [semble]). The time is to be deducted, however, which elapses between the death of the debtor and the appointment of an administrator of his estate, since in that time there is no one against whom suit may be brought. *Bule v. Bule*, 24 N. C. (2 Ired.) 87.

<sup>720</sup> *Brobst v. Brock*, 10 Wall. (U. S.) 519; *Boardman v. De Forest*, 5 Conn. 1; *Daggett v. Tallman*, 8 Conn. 168; *McLellan v. Crofton*, 6 Me. 307, 334 (semble); *Latimer v. Trowbridge*, 52 S. C. 193, 68 A. S. R. 893; *Hale v. Pack's Ex'rs*, 10 W. Va. 145, 152 (semble). On the contrary, it has been held that the presumption of payment arises even though, because of the nonresidence and absence of the debtor, the statute of limitations has not run against the debt. *Courtney v. Staudenmayer*, 56 Kan. 392, 54 A. S. R. 592; *Bean v. Tonnele*, 94 N. Y. 381, 46 A. R. 153; *Alston v. Hawkins*, 105 N. C. 3, 18 A. S. R. 874.

Occasional absence of the debtor does not rebut the presumption. Nor does the absence of one of two joint debtors. *Boardman v. De Forest*, 5 Conn. 1.

Absence of the creditor does not rebut the presumption. *Cox v. Brower*, 114 N. C. 422. *Contra*, *Shields v. Pringle*, 2 Bibb (Ky.) 387.

<sup>721</sup> *Bailey v. Jackson*, 16 Johns. (N. Y.) 210, 8 A. D. 309.

<sup>722</sup> *Flandong v. Winter*, 19 Ves. 196; *Brobst v. Brock*, 10 Wall. (U. S.) 519; *Boardman v. De Forest*, 5 Conn. 1; *Farmers' Bank v. Leonard*, 4 Har. (Del.) 536; *Knight v. Macomber*, 55 Me. 132; *Brantham v. Canaan*, 38 N. H. 268, 270; *Wood v. Deen*, 23 N. C. (1 Ired.) 230; *Tucker v. Baker*, 94 N. C. 162; *Ins. Co. v. Dunscomb*, 108 Tenn. 724, 91 A. S. R. 769; *Black v. Carpenter*, 3 Baxt. (Tenn.) 350; *Hale v. Pack's Ex'rs*, 10 W. Va. 145, 152 (semble). *Contra*, *Rogers v. Judd*, 5 Vt. 236, 26 A. D. 301.

In North Carolina, insolvency, to rebut the presumption, must have existed during the entire period of delay after the maturity of the debt.

that he is a relative of the creditor, and that an earlier enforcement of the claim would have distressed him;<sup>723</sup> and the fact that the creditor has demanded the debt,<sup>724</sup> or sued upon it,<sup>725</sup> within the twenty years' period, and prosecuted his claim with reasonable diligence.<sup>726</sup> If these facts, or any of them, be shown, the presumption of payment vanishes, and the question of payment is one for the jury upon all the evidence.<sup>727</sup>

*Alston v. Hawkins*, 105 N. C. 3, 18 A. S. R. 874. A short interval of solvency of which the creditor was ignorant does not save the presumption, however. *McKinder v. Littlejohn*, 26 N. C. (4 Ired.) 198.

The presumption is not rebutted by showing the debtor's inability to pay all his debts during the period of delay, if he was able to pay the debt in question. *State v. Wright*, 47 N. C. (2 Jones) 155.

The insolvency of one of two joint debtors does not rebut the presumption. *Boardman v. De Forest*, 5 Conn. 1.

<sup>723</sup> *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685, 23 A. D. 748.

<sup>724</sup> *Shields v. Pringle*, 2 Bibb (Ky.) 387, 388 (semble); *Wanmaker v. Van Buskirk*, 1 N. J. Eq. 685, 23 A. D. 748 (semble).

<sup>725</sup> *Semple v. Glenn*, 91 Ala. 245, 24 A. S. R. 894, 904 (semble); *Foulk v. Brown*, 2 Watts (Pa.) 209; *Bender v. Montgomery*, 8 Lea (Tenn.) 586.

A judgment obtained against one obligor on a joint and several obligation does not rebut the presumption of payment which may have arisen in favor of the other obligor. *Rogers v. Clements*, 98 N. C. 180. And see *Langston v. Shands*, 23 S. C. 149; *Hall v. Woodward*, 26 S. C. 557.

<sup>726</sup> The institution or pendency of suit during the twenty years' period, or a portion of it, does not defeat the presumption, where the creditor fails to prosecute the suit. *Van Loon v. Smith*, 103 Pa. 238; *Biddle v. Girard Nat. Bank*, 109 Pa. 349; *Palmer's Ex'r v. Dubois' Adm'r*, 1 Const. (S. C.) 178; *Langston v. Shands*, 23 S. C. 149; *Rogers v. Judd*, 5 Vt. 236, 26 A. D. 301.

The presumption of payment of a subscription to corporate stock is not rebutted by the fact that, within the twenty years' period, the court in which a creditor's bill had been filed against the corporation issued an order for a call, where the call was not attempted to be enforced by suit. *Semple v. Glenn*, 91 Ala. 245, 24 A. S. R. 894.

<sup>727</sup> *Grantham v. Canaan*, 38 N. H. 268. See page 62, *supra*.

In some states it is held that whether the evidence adduced in rebuttal is true is a question for the jury; and whether, if true, it is



**§ 76. Payment by negotiable instrument.**

(a) **Instrument of debtor.** If a debtor gives a bill, note, check, or other negotiable instrument to the creditor in payment of a sum due, he may be discharged from his original obligation either absolutely or conditionally. If a creditor, in consideration of a negotiable instrument given him by the debtor, agrees, either expressly or impliedly, to discharge the latter absolutely from the original obligation, all his rights are merged in the new contract, and, if it is not paid when due, his only remedy is upon it; he cannot revert to the original contract.<sup>728</sup> In the absence of an agreement, express or implied, to discharge the debtor absolutely, a presumption arises, where a negotiable instrument is accepted in lieu of a money payment, that the parties intended it to be only a conditional discharge; so that, if the instrument is not paid when due, the creditor's original rights are restored to him, and he may enforce the original contract.<sup>729</sup> And this presumption arises,

sufficient to rebut the presumption is a question for the court. *Gregory's Ex'rs v. Com.*, 121 Pa. 611, 6 A. S. R. 804. And see *Alston v. Hawkins*, 105 N. C. 3, 18 A. S. R. 874; *Reed v. Reed*, 46 Pa. 239. *Contra*, *Phillips v. Morrison*, 3 Bibb (Ky.) 105, 6 A. D. 638. Where evidence has been introduced to rebut the presumption, the question of payment is therefore one of law and fact. *Lewis v. Schwenn*, 93 Mo. 26, 3 A. S. R. 511. And see *Jackson v. Sackett*, 7 Wend. (N. Y.) 94. In some early cases the presumption of payment has been held to be one of fact merely. In this view, it is a question for the jury whether the presumption shall be drawn. *Stover v. Duren*, 3 Strob. (S. C.) 448, 51 A. D. 634.

<sup>728</sup> *Sard v. Rhodes*, 1 Mees. & W. 153; *McLellan v. Crofton*, 6 Me. 307.

The same is true where the creditor accepts the note of a third person in satisfaction of the debt. *Booth v. Smith*, 3 Wend. (N. Y.) 66.

<sup>729</sup> ENGLAND: *Sayer v. Wagstaff*, 5 Beav. 423; *Robinson v. Read*, 9 Barn. & C. 449, 455.

UNITED STATES: *The Kimball*, 3 Wall. 37.

ARKANSAS: *Akin v. Peters*, 45 Ark. 313.

CALIFORNIA: *Brown v. Olmsted*, 50 Cal. 162.

whether the debt is a pre-existing one, or a debt first contracted at the time the instrument is given. The fact that the consideration for the negotiable obligation is a contemporaneous

ILLINOIS: *Cheltenham S. & G. Co. v. Gates Iron Works*, 124 Ill. 623; *Hoodless v. Reid*, 112 Ill. 105; *Lochenmeyer v. Fogarty*, 112 Ill. 572.

MARYLAND: *Wyman v. Rae*, 11 Gill & J. 416, 37 A. D. 70.

MICHIGAN: *Case v. Seass*, 44 Mich. 195.

MISSOURI: *McMurray v. Taylor*, 30 Mo. 263, 77 A. D. 611.

NEW HAMPSHIRE: *Weymouth v. Sanborn*, 43 N. H. 171, 80 A. D. 144.

NEW YORK: *Feldman v. Beler*, 78 N. Y. 293; *Vall v. Foster*, 4 N. Y. 312.

OHIO: *Emerine v. O'Brien*, 36 Ohio St. 491.

OREGON: *Johnston v. Barrills*, 27 Or. 251, 50 A. S. R. 717.

PENNSYLVANIA: *Del. County T., S. D. & T. Ins. Co. v. Haser*, 199 Pa. 17, 85 A. S. R. 763.

RHODE ISLAND: *Nightingale v. Chafee*, 11 R. I. 609, 23 A. R. 531.

SOUTH DAKOTA: *Baker v. Baker*, 2 S. D. 261, 39 A. S. R. 776.

TEXAS: *McGuire v. Bidwell*, 64 Tex. 43.

VIRGINIA: *Moses v. Trice*, 21 Grat. 556, 8 A. R. 609.

WISCONSIN: *Blunt v. Walker*, 11 Wis. 334, 78 A. D. 709; *First Nat. Bank v. Case*, 63 Wis. 504; *Ford v. Mitchell*, 15 Wis. 304, 308 (semble).

*Contra*, *Smith v. Bettger*, 68 Ind. 254, 34 A. R. 256; *Paine v. Dwinel*, 53 Me. 52, 87 A. D. 533; *Ward v. Bourne*, 56 Me. 161; *Shumway v. Reed*, 34 Me. 560, 56 A. D. 679; *Dodge v. Emerson*, 131 Mass. 467; *Wait v. Brewster*, 31 Vt. 516; *Hutchins v. Olcutt*, 4 Vt. 549, 24 A. D. 634; *Mehlbarg v. Tisher*, 24 Wis. 607.

Even in those states where a view contrary to the text prevails, payment is not presumed from the acceptance of a negotiable note for an antecedent debt, if such debt is secured by mortgage or otherwise. *Reeder v. Nay*, 95 Ind. 164; *Bunker v. Barron*, 79 Me. 62, 1 A. S. R. 282; *Shumway v. Reed*, 34 Me. 560, 56 A. D. 679. And the presumption of absolute payment does not arise so as to defeat a vendor's right of stoppage in transitu, where he tenders the note to the maker in court. *Brewer Lumber Co. v. B. & A. R. Co.*, 179 Mass. 228, 88 A. S. R. 375. And in any event, the presumption of absolute payment obtaining in these states is rebuttable. *Bunker v. Barron*, 79 Me. 62, 1 A. S. R. 282; *Perrin v. Keene*, 19 Me. 355, 36 A. D. 759; *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158, 51 A. D. 59; *Brewer Lumber Co. v. B. & A. R. Co.*, 179 Mass. 228, 88 A. S. R. 375.

Taking a note from one of several joint debtors does not create a presumption of payment. *Tyner v. Stoops*, 11 Ind. 22, 71 A. D. 341;

one does not defeat the presumption.<sup>730</sup> The presumption of conditional payment is rebuttable, however, and it obtains only where there is no evidence of an agreement concerning the effect of the payment. If there is any evidence on the question, it is for the jury.<sup>731</sup>

All this applies to checks. In the absence of an agreement to the contrary,<sup>732</sup> the giving of a check is not payment until the money is received upon it, or until it is accepted by the bank on which it is drawn.<sup>733</sup>

In *re Davis' Estate*, 5 Whart. (Pa.) 530, 34 A. D. 574; *Hoeflinger v. Wells*, 47 Wis. 628 (semble).

Whether the payment by note of the debtor or of a third person be regarded as absolute or conditional, the creditor's remedy is thereby suspended until the note matures. *Mitchell v. Hockett*, 25 Cal. 538, 85 A. D. 151; *Yates v. Donaldson*, 5 Md. 389, 61 A. D. 283. If the note is only a conditional payment, however, the creditor may file a mechanic's lien on account of the debt before the note matures. *McMurray v. Taylor*, 30 Mo. 263, 77 A. D. 611.

<sup>730</sup> *Devlin v. Chamblin*, 6 Minn. 468 (Gil. 325); *Ford v. Mitchell*, 15 Wis. 304, 308 (semble).

The presumption is that a draft issued by a bank to the debtor in the creditor's name, and accepted by the creditor for a contemporaneously contracted debt, is taken in absolute payment. *Hall v. Stevens*, 116 N. Y. 201.

<sup>731</sup> *Cheltenham S. & G. Co. v. Gates Iron Works*, 124 Ill. 623; *Hall v. Stevens*, 116 N. Y. 201; *Briggs v. Holmes*, 118 Pa. 283, 4 A. S. R. 597; *Andrews v. German Nat. Bank*, 9 Helsk. (Tenn.) 211, 24 A. R. 300.

<sup>732</sup> *Tayloe v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390; *Comptoir D'Escompte de Paris v. Dresbach*, 78 Cal. 15; *Strong v. King*, 35 Ill. 1, 85 A. D. 336.

<sup>733</sup> *Henry v. Conley*, 48 Ark. 267; *Steinhart v. Nat. Bank*, 94 Cal. 362, 28 A. S. R. 132; *Koonen v. D. C.*, 4 Mackey (D. C.) 339, 54 A. R. 278; *Pritchard v. Smith*, 77 Ga. 463; *Strong v. King*, 35 Ill. 1, 85 A. D. 336; *Burrows v. State*, 137 Ind. 474, 45 A. S. R. 210; *Nat. Bank v. C., B. & N. R. Co.*, 44 Minn. 224, 20 A. S. R. 566; *Johnson-Brinkman Commission Co. v. Cent. Bank*, 116 Mo. 558, 38 A. S. R. 615; *Barnet v. Smith*, 30 N. H. 256, 64 A. D. 290; *Thomas v. Westchester County Sup'rs*, 115 N. Y. 47.

This is true as a rule, even though the check is certified. The pre-

(b) **Instrument of third person.** Even in those jurisdictions where the presumption of conditional payment obtains it does not apply in all cases where the negotiable instrument taken by the creditor is not that of the debtor, but that of a third person. A distinction is to be noted here between pre-existing debts and contemporaneous debts,—debts that were contracted before the instrument was given, and debts contracted at the time of that event. If a negotiable obligation of a third person is taken for a contemporaneous debt,—that is to say, for a debt then first springing into existence,—the presumption is that there was a barter or exchange of property, and accordingly the instrument is regarded as absolute payment,<sup>734</sup> unless evidence to the contrary is adduced.<sup>735</sup> On the other hand, if the debt for which a third person's negoti-

sumption of conditional payment nevertheless arises. *Larsen v. Breene*, 12 Colo. 480; *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 A. D. 436; *Born v. First Nat. Bank*, 123 Ind. 78, 18 A. S. R. 312; *Mut. Nat. Bank v. Rotge*, 28 La. Ann. 933, 26 A. R. 126; *Minot v. Russ*, 156 Mass. 458, 32 A. S. R. 472; *Cincinnati O. & F. Co. v. Nat. Lafayette Bank*, 51 Ohio St. 106, 46 A. S. R. 560; *Andrews v. German Nat. Bank*, 9 Heisk. (Tenn.) 211, 24 A. R. 300. The rule is otherwise, however, where the holder of the check himself procures it to be certified. In this event the drawer is discharged from the debt for which the check was given. *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634, 31 A. S. R. 403; *Born v. First Nat. Bank*, 123 Ind. 78, 18 A. S. R. 312; *Minot v. Russ*, 156 Mass. 458, 32 A. S. R. 472; *First Nat. Bank v. Leach*, 52 N. Y. 350, 11 A. R. 708; *French v. Irwin*, 4 Baxt. (Tenn.) 401, 27 A. R. 769.

<sup>734</sup> *Devlin v. Chamblin*, 6 Minn. 468 (Gil. 325); *Whitbeck v. Van Ness*, 11 Johns. (N. Y.) 409, 6 A. D. 383; *Noel v. Murray*, 13 N. Y. 167; *Gibson v. Tobey*, 46 N. Y. 637, 7 A. R. 397; *Bayard v. Shunk*, 1 Watts & S. (Pa.) 92, 37 A. D. 441; *Ford v. Mitchell*, 15 Wis. 304, 308 (semble). See, however, *Hoeflinger v. Wells*, 47 Wis. 628.

The presumption of absolute payment does not arise where a vendor of real property who takes a third person's note at the time of sale does not convey the legal title. *Mansfield v. Dameron*, 42 W. Va. 794, 57 A. S. R. 884.

If an agent buys property for his principal, and draws on him at sight for the price, and transfers the draft to the seller, it does not

able obligation is given is a pre-existing debt,—that is to say, if it was contracted before the taking of the instrument,—then the presumption first mentioned, that the payment is only conditional, obtains,<sup>736</sup> subject to be defeated by evidence to the contrary.<sup>737</sup> However, as has been said, these presumptions are not conclusive. The question depends primarily upon the intent of the parties.<sup>738</sup>

presumptively constitute payment of the principal's debt for the property. *Taylor v. Conner*, 41 Miss. 722, 97 A. D. 419.

<sup>736</sup> *Devlin v. Chamblin*, 6 Minn. 468 (Gil. 325).

<sup>737</sup> *Caldwell v. Hall*, 49 Ark. 508, 4 A. S. R. 64; *Mitchell v. Hockett*, 25 Cal. 538, 85 A. D. 151; *Tyner v. Stoops*, 11 Ind. 22, 71 A. D. 341; *Berry v. Griffin*, 10 Md. 27, 69 A. D. 123; *Devlin v. Chamblin*, 6 Minn. 468 (Gil. 325); *Whitbeck v. Van Ness*, 11 Johns. (N. Y.) 409, 6 A. D. 383; *Shepherd v. Busch*, 154 Pa. 149, 35 A. S. R. 815; *Holmes v. Briggs*, 131 Pa. 233, 17 A. S. R. 804; *Barelli v. Brown*, 1 McCord (S. C.) 449, 10 A. D. 683; *Ford v. Mitchell*, 15 Wis. 304, 308 (semble).

The debt is not discharged by payment by the check or draft of a third person erroneously supposed by both debtor and creditor to be good. *Weaver v. Nixon*, 69 Ga. 699; *Weddigen v. Boston Elastic Fabric Co.*, 100 Mass. 422; *Felig v. Sleet*, 43 Ohio St. 51, 54 A. R. 800. If, however, the debtor sends the creditor a draft of one third person on another, and, on maturity of the draft, the creditor surrenders it to the drawee in exchange for his check, without giving notice of nonpayment, it constitutes payment of the debt. *Whitney v. Esson*, 99 Mass. 308, 96 A. D. 762.

In some states, as has been seen (note 729, *supra*), the presumption is that a simple contract debt is discharged by the taking of a negotiable instrument. In Indiana and Vermont this presumption arises even where the debt is a pre-existing one, and the note is that of a third person. *Smith v. Bettger*, 68 Ind. 254, 34 A. R. 256; *Wemet v. Missisquoi Lime Co.*, 46 Vt. 458. In Massachusetts, however, if the presumption arises at all under such circumstances, it is of little weight. *Melledge v. Boston Iron Co.*, 5 Cush. (Mass.) 158, 51 A. D. 59.

<sup>737</sup> *Devlin v. Chamblin*, 6 Minn. 468 (Gil. 325); *Shepherd v. Busch*, 154 Pa. 149, 35 A. S. R. 815; *Holmes v. Briggs*, 131 Pa. 233, 17 A. S. R. 804.

As to the effect of the debtor's indorsing the note thus given, see *Whitney v. Goin*, 20 N. H. 354; *Ford v. Mitchell*, 15 Wis. 304, 309.

<sup>738</sup> *Duncan v. Pac. Boom Co.*, 6 Wash. 593, 36 A. S. R. 182.

(c) **Accounting and settlement.** The burden of proving an accounting and settlement embracing the demand in suit rests ordinarily on the debtor.<sup>739</sup> If, however, the debtor has given the creditor a note, it raises a presumption that an accounting and settlement was had of all accounts theretofore existing between the parties, and that the maker was found to be indebted to the payee in the amount of the note.<sup>740</sup> This presumption is rebuttable.<sup>741</sup>

§ 77. **Receipt.**

If a creditor gives the debtor a receipt, a presumption arises that the debt is paid, and the burden of adducing evidence to the contrary is cast on the creditor.<sup>742</sup> This presumption is disputable.<sup>743</sup>

<sup>739</sup> *Baumier v. Antiau*, 79 Mich. 509; *Hitchcock v. Davis*, 87 Mich. 629, 633.

<sup>740</sup> *Tisdale v. Maxwell*, 58 Ala. 40; *Copeland v. Clark*, 2 Ala. 388; *Piper v. Wade*, 57 Ga. 223; *Kirchner v. Lewis' Adm'x*, 27 Ind. 22; *Long v. Straus*, 124 Ind. 84; *Smith v. Bissell*, 2 G. Greene (Iowa) 379; *Greenwade v. Greenwade*, 3 Dana (Ky.) 495; *Kinman v. Cannefax*, 34 Mo. 147; *De Freest v. Bloomingdale*, 5 Denio (N. Y.) 304; *Lake v. Tysen*, 6 N. Y. 461. *Contra*, *Crabtree v. Rowand*, 33 Ill. 421; *Ankeny v. Pierce*, Breese (Ill.) 289, 12 A. D. 174.

A presumption of payment of one note may arise from the subsequent giving of a larger note by the payee to the maker. *French v. French*, 84 Iowa, 655, 15 L. R. A. 300. See, however, *Tisdale v. Maxwell*, 58 Ala. 40.

<sup>741</sup> *Piper v. Wade*, 57 Ga. 223; *Kirchner v. Lewis' Adm'x*, 27 Ind. 22; *Smith v. Bissell*, 2 G. Greene (Iowa) 379.

<sup>742</sup> *Scruggs v. Bibb*, 33 Ala. 481; *Wooten v. Nall*, 18 Ga. 609, 617; *Marston v. Wilcox*, 2 Ill. 270; *Ramsdell v. Clark*, 20 Mont. 103; *Obart v. Letson*, 17 N. J. Law, 78, 34 A. D. 182; *Reid v. Reid*, 13 N. C. (2 Dev.) 247, 18 A. D. 570.

If a defendant pleads payment, the burden of proof is on him to establish it (section 74, *supra*). This burden is not shifted by the introduction of a receipt, since the burden of proof never shifts. *Terryberry v. Woods*, 69 Vt. 94. The effect of the presumption of payment to which the receipt gives rise is to throw on the plaintiff, not the bur-

### § 78. Possession of obligation.

If an obligation, whether for the payment of money or the delivery of property, is evidenced by a writing, the fact that the debtor has it in his possession after maturity raises a presumption that he has paid it, and the burden of adducing evidence to the contrary is accordingly cast upon the creditor.<sup>743</sup>

den of proof in the sense of burden of persuading the jury of the fact of payment, but the burden of adducing evidence in rebuttal of the presumption, either by way of denying or explaining the receipt. See §§ 2, 4(b), *supra*.

<sup>743</sup> *Clark v. Simmons*, 4 Port. (Ala.) 14; *Comptoir D'Escompte de Paris v. Dresbach*, 78 Cal. 15; *Shropshire v. Long*, 68 Iowa, 537; *McAllister v. Engle*, 52 Mich. 56; *Ensign v. Webster*, 1 Johns. Cas. (N. Y.) 145, 1 A. D. 108; *Watson v. Blaine*, 12 Serg. & R. (Pa.) 131, 14 A. D. 669.

<sup>744</sup> *Bond. Carroll v. Bowie*, 7 Gill (Md.) 34.

*Check.* *Peavy v. Hovey*, 16 Neb. 416. And see *Beebe v. Real Estate Bank*, 4 Ark. 546. *Contra*, *Patton Adm'rs v. Ash*, 7 Serg. & R. (Pa.) 116. The presumption does not arise from a drawee's possession of a check unless it is indorsed by the payee. *Pickle v. Muse*, 88 Tenn. 380, 17 A. S. R. 900. *Contra*, *Zeigler v. Gray*, 12 Serg. & R. (Pa.) 42 (semble).

*Due bill.* *Tedens v. Schumers*, 112 Ill. 263.

*Note.* *Tuskaloosa C. S. Oil Co. v. Perry*, 85 Ala. 158; *Potts v. Coleman*, 86 Ala. 94; *Hollenberg v. Lane*, 47 Ark. 394; *Turner v. Turner*, 79 Cal. 565; *Sutphen v. Cushman*, 35 Ill. 186; *Cassem v. Heustis*, 201 Ill. 208, 94 A. S. R. 160; *Dougherty v. Deeney*, 41 Iowa, 19; *Smith v. Gardner*, 36 Neb. 741; *Smith v. Smith*, 15 N. H. 55; *Poston v. Jones*, 122 N. C. 536; *Bracken v. Miller*, 4 Watts & S. (Pa.) 102; *Halfin v. Winkelman*, 83 Tex. 165. And see *Callahan v. First Nat. Bank*, 78 Ky. 604, 39 A. R. 262; *Callahan v. Bank of Ky.*, 82 Ky. 231. Possession of a note by one of two makers is prima facie evidence of payment by him as against the other maker. *Waldrip v. Black*, 74 Cal. 409; *Chandler v. Davis*, 47 N. H. 462. *Contra*, *Bates v. Cain's Estate*, 70 Vt. 144. Where a note payable to the payee only has been indorsed to another, the payee's possession of it is prima facie evidence of payment by him to the indorsee. *Smith v. St. Lawrence*, 2 N. C. (1 Hayw.) 175, 1 A. D. 556. And see *Weakly v. Bell*, 9 Watts (Pa.) 273, 36 A. D. 116.

If the drawee in an order for the doing of work or delivery of goods or payment of money has it in his possession, the presumption is that he has paid it. *Shepherd v. Currie*, 1 Starkie, 454; *Gibbon v. Feather-*

This presumption may be rebutted by evidence of nonpayment,<sup>745</sup> and if it is shown that the debtor had access to the creditor's papers, the presumption is repelled.<sup>746</sup>

**§ 79. Cancellation of obligation.**

If an obligation is evidenced by a writing, a cancellation of the instrument by the creditor, whether by destruction, mutilation, or otherwise, gives rise to a presumption that the debt has been paid and discharged, and the burden of adducing evidence to the contrary is cast on the creditor.<sup>747</sup> The presumption is a rebuttable one, and the creditor may accordingly show that he canceled the obligation by accident or mistake.<sup>748</sup>

stonhaugh, 1 Starkie, 225; Lane v. Farmer, 13 Ark. 63; Alvord v. Baker, 9 Wend. (N. Y.) 323; Zeigler v. Gray, 12 Serg. & R. (N. Y.) 42; Connelly v. McKean, 64 Pa. 113; Hays v. Samuels, 55 Tex. 560. And see Conway v. Case, 22 Ill. 127.

The presumption of payment arises even where the obligation has not matured, if it has been in circulation. First Nat. Bank v. Harris, 7 Wash. 139.

Presumption of ownership, and therefore of nonpayment, arising from the obligee's possession of the evidence of indebtedness, see note 778, *infra*.

<sup>745</sup> Potts v. Coleman, 67 Ala. 221; Excelsior Mfg. Co. v. Owens, 58 Ark. 556; Turner v. Turner, 79 Cal. 565; Sutphen v. Cushman, 35 Ill. 186; Smith v. Smith, 15 N. H. 55; Garlock v. Geortner, 7 Wend. (N. Y.) 198; Pickle v. Muse, 88 Tenn. 380, 17 A. S. R. 900; Halpin v. Winkleman, 83 Tex. 165.

<sup>746</sup> Grimes v. Hilliary, 150 Ill. 141; Erhart v. Dietrich, 118 Mo. 418; Grey v. Grey, 47 N. Y. 552.

<sup>747</sup> Pitcher v. Patrick's Adm'rs, 1 Stew. & P. (Ala.) 478. And see Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 117.

The fact that the maker's name has been torn off from a note affords a presumption of payment where, and only where, the note is in the maker's possession. Powell v. Swan's Adm'r, 5 Dana (Ky.) 1.

<sup>748</sup> Pitcher v. Patrick's Adm'rs, 1 Stew. & P. (Ala.) 478. And see Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 117.



**§ 80. Installments.**

If a debt is payable in installments, evidence that one installment has been paid gives rise to a presumption that all previous installments have been paid.<sup>749</sup> This presumption is rebuttable.<sup>750</sup>

**§ 81. Application of payments.**

The presumption is that payments made on an account current are to be applied in discharge of the earliest items in the account.<sup>751</sup> If, however, a part payment has been made, and there is no evidence that only one debt existed between the parties at the time, there is no presumption that the payment was to apply on that particular debt.<sup>752</sup>

**§ 82. Time of payment.**

If the time of payment for goods sold is not fixed by the parties, the presumption is that payment is to be made upon delivery of the goods.<sup>753</sup>

<sup>749</sup> *Brewer v. Knapp*, 1 Pick. (Mass.) 332, 336 (semble); *Decker v. Livingston*, 15 Johns. (N. Y.) 479, 483. See, also, *Hodgdon v. Wight*, 36 Me. 326; *Attleborough v. Middleborough*, 10 Pick. (Mass.) 378; *Elliott v. Williamson*, 11 Lea (Tenn.) 38.

<sup>750</sup> *Brewer v. Knapp*, 1 Pick. (Mass.) 332, 336 (semble); *Ham v. Barret*, 28 Mo. 388; *Decker v. Livingston*, 15 Johns. (N. Y.) 479, 483. And see *Hodgdon v. Wight*, 36 Me. 326; *Attleborough v. Middleborough*, 10 Pick. (Mass.) 378; *Robbins v. Townsend*, 20 Pick. (Mass.) 345.

<sup>751</sup> *Crompton v. Pratt*, 105 Mass. 255.

<sup>752</sup> *Somervail v. Gillies*, 31 Wis. 152. See, however, *Pope v. Dodson*, 58 Ill. 360.

<sup>753</sup> *Roberts v. Wilcoxson*, 36 Ark. 355.

This results from the rule of substantive law that, where no time is set for payment of the price, payment is a condition precedent to the right to receive the goods. *Hammon*, Cont. § 465; *Bloxam v. Sanders*, 4 Barn. & C. 941; *Allen v. Hartfield*, 76 Ill. 358; *Lester v. Jewett*, 11 N. Y. 453.

**§ 83. Payment or loan.**

If money or money's worth is delivered by one person to another, the presumption is, in the absence of an explanation, that the transaction constituted payment of an antecedent debt, and not a present loan.<sup>754</sup>

**§ 84. Payment or security.**

If a debtor turns over personal property to the creditor, the presumption is, in the absence of other evidence on the point, that the transfer was made as security, and not as payment.<sup>755</sup>

**S. SANITY.**

§ 85. Sanity being the normal condition, it is presumed, in the absence of evidence to the contrary, that at a given time a given person was sane, and the burden of adducing evidence of mental unsoundness is accordingly on the party who desires to profit by that abnormal condition. This presumption is one of law, but it is not conclusive; evidence is admissible to rebut it.<sup>756</sup> And when evidence in rebuttal has been admitted, the presumption vanishes, and the question of sanity is then one for the jury on all the evidence, regardless of any presumption.<sup>757</sup>

<sup>754</sup> Welch v. Seaborn, 1 Starkle, 474; Aubert v. Walsh, 4 Taunt. 293; Boswell v. Smith, 6 Car. & P. 60; Bromwell v. Bromwell's Estate, 139 Ill. 424; Gerding v. Walter, 29 Mo. 426; Patton's Adm'rs v. Ash, 7 Serg. & R. (Pa.) 116; Somervail v. Gillies, 31 Wis. 152.

An order directing the drawee to let the payee have certain goods is, when in the drawee's hands, *prima facie* evidence of a sale to the drawer. Alvord v. Baker, 9 Wend. (N. Y.) 323. An order for money, however, is presumed to have been drawn against funds of the drawer in the drawee's hands. Alvord v. Baker, *supra*; White v. Ambler, 8 N. Y. 170.

<sup>755</sup> Borland v. Nev. Bank, 99 Cal. 89, 37 A. S. R. 32.

<sup>756</sup> Davis v. U. S., 160 U. S. 469, 486.

Probative effect of inquisition of lunacy, see Hammon, Cont. §§ 183, 184, 187.

**§ 86. Criminal cases.**

In a criminal case, the state is charged with the burden of proof with reference to every fact that constitutes an element of the offense. Of these facts, by the weight of authority, sanity of the accused is one. Unless, therefore, the jury are satisfied, upon a consideration of all the evidence, whether adduced by the state or by the accused, that at the time the alleged crime was committed the accused was of sane mind, the state has failed to establish its case, and the accused is entitled to an acquittal.<sup>757</sup> In some states, however, this view does not prevail. Insanity is regarded as an affirmative de-

<sup>757</sup> *Rogers v. Armstrong Co.* (Tex. Civ. App.) 30 S. W. 848; *Mo. Pac. R. Co. v. Brazell*, 72 Tex. 233.

<sup>758</sup> UNITED STATES: *Davis v. U. S.*, 160 U. S. 469; *Thayer*, Cas. Ev. 90.

COLORADO: *Jones v. People*, 23 Colo. 276.

CONNECTICUT: *State v. Johnson*, 40 Conn. 136.

FLORIDA: *Armstrong v. State*, 30 Fla. 170, 17 L. R. A. 484, 27 Fla. 366, 26 A. S. R. 72.

ILLINOIS: *Hopps v. People*, 31 Ill. 385, 83 A. D. 231; *Dacey v. People*, 116 Ill. 555; *Montag v. People*, 141 Ill. 75; *Lilly v. People*, 148 Ill. 467; *Chase v. People*, 40 Ill. 352.

INDIANA: *Plake v. State*, 121 Ind. 433, 16 A. S. R. 408.

KANSAS: *State v. Crawford*, 11 Kan. 32; *State v. Nixon*, 32 Kan. 205.

MICHIGAN: *People v. Garbutt*, 17 Mich. 9, 97 A. D. 162.

MISSISSIPPI: *Cunningham v. State*, 56 Miss. 269, 31 A. R. 360; *Ford v. State*, 73 Miss. 734, 35 L. R. A. 117.

NEBRASKA: *Wright v. People*, 4 Neb. 407.

NEW HAMPSHIRE: *State v. Bartlett*, 43 N. H. 224, 80 A. D. 154; *State v. Jones*, 50 N. H. 369, 9 A. R. 242, 266.

NEW YORK: *O'Connell v. People*, 87 N. Y. 377, 41 A. R. 379; *Brother-ton v. People*, 75 N. Y. 159; *Walker v. People*, 88 N. Y. 81.

OKLAHOMA: *Maas v. Ter.*, 10 Okl. 714, 53 L. R. A. 814.

TENNESSEE: *King v. State*, 91 Tenn. 617; *Dove v. State*, 3 Heisk. 348.

The burden of proof was held to be on the state in *Com. v. Eddy*, 7 Gray (Mass.) 583, although it was held that the accused must overcome the presumption of sanity operating in favor of the state by a preponderance of the evidence. The effect of this requirement would

fense, the burden of proving which rests on the accused; so that, if he does not adduce evidence which convinces the jury of its existence, he is not entitled to an acquittal on that ground.<sup>759</sup>

seem to be to throw the burden of establishing insanity on the accused.

If the state asserts that the accused's insanity was a drunken madness, and so no defense, the burden is on it to show that fact. *U. S. v. McGlue*, 1 Curt. 1, Fed. Cas. No. 15,679.

The burden of proof operates only in the trial; consequently in an investigation of the grand jury, the state need not introduce evidence of the accused's sanity. *U. S. v. Lawrence*, 4 Cranch, C. C. 514, Fed. Cas. No. 15,576.

<sup>759</sup> ENGLAND: *McNaghten's Case*, 10 Clark & F. 200; *Reg. v. Layton*, 4 Cox Cr. Cas. 149.

ALABAMA: *Ford v. State*, 71 Ala. 385; *Parsons v. State*, 81 Ala. 577, 60 A. R. 193; *Maxwell v. State*, 89 Ala. 150.

ARKANSAS: *Bolling v. State*, 54 Ark. 588; *Williams v. State*, 50 Ark. 511.

CALIFORNIA: *People v. Coffman*, 24 Cal. 230; *People v. Messersmith*, 61 Cal. 246; *People v. Bawden*, 90 Cal. 195; *People v. McNulty*, 93 Cal. 427; *People v. Allender*, 117 Cal. 81; *People v. Ward*, 105 Cal. 335.

DELAWARE: *State v. West*, *Houst. Cr. Cas.* 371; *State v. Pratt*, *Houst. Cr. Cas.* 249.

GEORGIA: *Carr v. State*, 96 Ga. 284.

IOWA: *State v. Bruce*, 48 Iowa, 530; *State v. Jones*, 64 Iowa, 349.

KENTUCKY: *Phelps v. Com.*, 17 Ky. L. R. 706, 32 S. W. 470.

LOUISIANA: *State v. Scott*, 49 La. Ann. 253, 36 L. R. A. 721.

MAINE: *State v. Lawrence*, 57 Me. 574.

MISSOURI: *State v. Schaefer*, 116 Mo. 96.

NEVADA: *State v. Hartley*, 22 Nev. 342, 28 L. R. A. 33; *State v. Lewis*, 20 Nev. 333.

NEW JERSEY: *Graves v. State*, 45 N. J. Law, 347, 46 A. R. 778; *Clawson v. State*, 59 N. J. Law, 434.

OHIO: *Kelch v. State*, 55 Ohio St. 146, 60 A. S. R. 680; *Bond v. State*, 23 Ohio St. 349.

OREGON: *State v. Hansen*, 25 Or. 391 (statute).

PENNSYLVANIA: *Ortwein v. Com.*, 76 Pa. 414, 18 A. R. 420; *Lynch v. Com.*, 77 Pa. 205; *Com. v. Bezek*, 168 Pa. 603.

SOUTH CAROLINA: *State v. Paulk*, 18 S. C. 514.

While the state must, at the close of the evidence, convince the jury of the existence of all the elements of the crime, yet it is not always obliged to adduce affirmative evidence of each of those facts. Some presumption may operate to relieve it of that burden. So it is in regard to sanity, even in those jurisdictions where the state bears the burden of proof as to that fact. Mental competency being the normal condition of man, the presumption is, in the absence of evidence to the contrary, that at any given time a given person was sane. Accordingly, if one accused of crime seeks to avoid liability on the ground of insanity, he is, by the weight of authority, under the necessity of adducing evidence of that fact. Otherwise, a presumption of sanity operates in favor of the state's case which takes the place of evidence of sanity.<sup>700</sup> The bur-

TEXAS: *Leache v. State*, 22 Tex. App. 279; *Fisher v. State*, 30 Tex. App. 502.

UTAH: *People v. Dillon*, 8 Utah, 92.

See comment in preceding note on *Com. v. Eddy*, 7 Gray (Mass.) 583.

<sup>700</sup> UNITED STATES: *Davis v. U. S.*, 160 U. S. 469, 486, *Thayer, Cas. Ev.* 90.

ALABAMA: *McAllister v. State*, 17 Ala. 434, 52 A. D. 180.

ARKANSAS: *McKenzie v. State*, 26 Ark. 334.

CONNECTICUT: *State v. Hoyt*, 47 Conn. 518.

FLORIDA: *Armstrong v. State*, 30 Fla. 170, 17 L. R. A. 484.

ILLINOIS: *Dacey v. People*, 116 Ill. 555; *Chase v. People*, 40 Ill. 352; *Montag v. People*, 141 Ill. 75.

INDIANA: *Gueting v. State*, 66 Ind. 94, 32 A. R. 99.

KANSAS: *State v. Crawford*, 11 Kan. 32.

LOUISIANA: *State v. De Rance*, 34 La. Ann. 186, 44 A. R. 426.

MASSACHUSETTS: *Com. v. Rogers*, 7 Metc. 500, 41 A. D. 458; *Com. v. Eddy*, 7 Gray, 583.

MICHIGAN: *People v. Garbutt*, 17 Mich. 9, 97 A. D. 162.

MISSISSIPPI: *Cunningham v. State*, 56 Miss. 269, 31 A. R. 360; *Ford v. State*, 73 Miss. 734, 35 L. R. A. 117.

MISSOURI: *State v. McCoy*, 34 Mo. 531, 86 A. D. 121; *State v. Rede-meler*, 71 Mo. 173, 36 A. R. 462.

NEW HAMPSHIRE: *State v. Bartlett*, 43 N. H. 224, 80 A. D. 154; *State v. Pike*, 49 N. H. 399, 6 A. R. 533, 544.

den thus cast on the accused is not the burden of proof in the sense that he must, upon a consideration of all the evidence, convince the jury of his insanity. It is merely the burden of adducing or going forward with evidence on that particular point.

Whether sanity or insanity may be proved by a preponderance of evidence, or whether proof beyond a reasonable doubt is required, is a question affecting the measure of evidence. Though usually linked with questions of presumption and burden of proof, it is distinct from them, and is accordingly considered in another connection.<sup>761</sup>

#### § 87. Civil cases.

In civil cases, the party who is obliged, by rules of substantive law and of pleading, to allege sanity or insanity, bears the burden of proof as to that allegation in the sense that he must convince the jury of the existence of the fact;<sup>762</sup> but, if he alleges sanity, the presumption of sanity makes a prima

NEW MEXICO: *Faulkner v. Ter.*, 6 N. M. 464.

NEW YORK: *O'Connell v. People*, 87 N. Y. 377, 41 A. R. 379; *Brother-ton v. People*, 75 N. Y. 159; *Walker v. People*, 88 N. Y. 81; *People v. McCann*, 16 N. Y. 58, 69 A. D. 642.

NORTH CAROLINA: *State v. Norwood*, 115 N. C. 789, 44 A. S. R. 498; *State v. Potts*, 100 N. C. 457.

OKLAHOMA: *Maas v. Ter.*, 10 Okl. 714, 53 L. R. A. 814.

PENNSYLVANIA: *Com. v. Gerade*, 145 Pa. 289, 27 A. S. R. 689.

TENNESSEE: *King v. State*, 91 Tenn. 617.

VIRGINIA: *Dejarnette v. Com.*, 75 Va. 867; *Baccigalupo v. Com.*, 33 Grat. 807, 36 A. R. 795.

The same is true in regard to idioecy. *Com. v. Heath*, 11 Gray (Mass.) 303.

<sup>761</sup> See § 6(a), *supra*.

<sup>762</sup> This rule applies against the plaintiff in an action for personal injuries, where he seeks to avoid the effect of conduct on his part which, if he were sane, would constitute contributory negligence. *Worthington v. Mencer*, 96 Ala. 310, 17 L. R. A. 407.

facie case in his favor, and accordingly casts on his opponent the burden of adducing evidence of insanity.

(a) **Contracts and conveyances.** If, for example, a person seeks to avoid a marriage contract on the ground of insanity, he bears the burden of establishing that fact.<sup>763</sup> Again, if a person sues directly or indirectly to avoid, on the same ground, a transfer made by him, he must establish insanity at the time of the transfer; and the same is true where the suit is brought by his guardian or his heirs.<sup>764</sup> If, on the other hand, a grantee brings ejectment for the land, and the grantor, his guardian, or his heir, defends on the ground that he was insane when he made the deed, the burden of establishing that fact rests on the defendant.<sup>765</sup> So, if the insurer defends an action on the policy because the insured committed suicide, and the beneficiary seeks to avoid the effect of the breach of condition on the ground that at the time he took his life the insured was insane, the burden of establishing insanity rests upon the beneficiary.<sup>766</sup>

<sup>763</sup> *Rawdon v. Rawdon*, 28 Ala. 565; *Baughman v. Baughman*, 32 Kan. 538; *Banker v. Banker*, 63 N. Y. 409; *Nonnemacher v. Nonnemacher*, 159 Pa. 634.

<sup>764</sup> *Pike v. Pike*, 104 Ala. 642; *Francis v. Wilkinson*, 147 Ill. 370; *Lilly v. Waggoner*, 27 Ill. 395; *Myatt v. Walker*, 44 Ill. 485; *Greene v. Phoenix M. L. Ins. Co.*, 134 Ill. 310, 10 L. R. A. 576; *Achey v. Stephens*, 8 Ind. 411; *Fay v. Burditt*, 81 Ind. 433, 42 A. R. 142; *Wright v. Wright*, 139 Mass. 177, 182; *Howe v. Howe*, 99 Mass. 88; *Brown v. Brown*, 39 Mich. 792; *Youn v. Lamont*, 56 Minn. 216; *Jones v. Jones*, 137 N. Y. 610; *Miller v. Rutledge*, 82 Va. 863; *Jarrett v. Jarrett*, 11 W. Va. 584; *Anderson v. Cranmer*, 11 W. Va. 562; *Buckey v. Buckey*, 38 W. Va. 168. And see *Attorney-General v. Parnter*, 3 Brown Ch. 441, 443.

<sup>765</sup> *Hoge's Lessee v. Fisher*, Pet. C. C. 163, Fed. Cas. No. 6,585.

<sup>766</sup> *Terry v. Life Ins. Co.*, 1 Dill. 403, Fed. Cas. No. 13,839, affirmed 15 Wall. (U. S.) 580; *Gay v. Union M. L. Ins. Co.*, 9 Blatchf. 142, Fed. Cas. No. 5,282; *Moore v. Conn. M. L. Ins. Co.*, 1 Flap. 363, Fed. Cas. No. 9,755; *Jarvis v. Conn. M. L. Ins. Co.*, Fed. Cas. No. 7,226; *Hopkins v. N. W. L. Assur. Co.*, 94 Fed. 729; *Merritt v. Cotton States L. Ins. Co.*, 55 Ga. 103; *Knickerbocker L. Ins. Co. v. Peters*, 42 Md. 414; *Cooper v.*

(b) **Wills.** The proponent of a will is charged with the burden of proof in the sense that he must establish the existence of every fact that constitutes an element of his case. Of these facts sanity of the testator is one; so that if the jury, upon a consideration of all the evidence, whether adduced by the proponent or by the contestant, are not convinced that the testator was sane when he made the will, the verdict must be for the contestant.<sup>767</sup> In some states, however, this rule does

Mass. M. L. Ins. Co., 102 Mass. 227, 3 A. R. 451; Weed v. Mut. Ben. L. Ins. Co., 70 N. Y. 561; Phadenhauer v. Germania L. Ins. Co., 7 Heisk. (Tenn.) 567, 19 A. R. 623.

While the fact of suicide is not *prima facie* evidence of insanity, yet it may be considered by the jury, together with the other facts and circumstances in evidence, in determining the question of insanity. Ritter v. Mut. L. Ins. Co., 69 Fed. 505; Duffield v. Robeson, 2 Har. (Del.) 375; Grand Lodge v. Wieting, 168 Ill. 408, 61 A. S. R. 123; Jones v. Gorham, 90 Ky. 622, 29 A. S. R. 423.

Where the policy was to be void if the insured should die by his own hand; "except that, in case he shall die by his own hands while insane," the insurer should refund the premiums, with interest, the insurer cannot defeat a recovery on the policy because the insured died by his own hand, unless it shows that he knew the physical nature and effect of the act causing his death. Mut. Ben. L. Ins. Co. v. Daviess' Ex'r, 87 Ky. 542.

<sup>767</sup> ENGLAND: Sutton v. Sadler, 3 C. B. (N. S.) 87, Thayer, Cas. Ev. 97.

CONNECTICUT: Knox's Appeal, 26 Conn. 20; Comstock v. Hadlyme Ecc. Soc., 8 Conn. 254, 20 A. D. 100; Livingston's Appeal, 63 Conn. 68; Barber's Appeal, 63 Conn. 393, 22 L. R. A. 90.

GEORGIA: Evans v. Arnold, 52 Ga. 169.

ILLINOIS: Wilbur v. Wilbur, 129 Ill. 392; Harp v. Parr, 168 Ill. 459, 477.

KENTUCKY: Hawkins v. Grimes, 13 B. Mon. 257; King v. King, 19 Ky. L. R. 868, 42 S. W. 347; Johnson v. Stivers, 95 Ky. 128.

MAINE: Gerrish v. Nason, 22 Me. 438, 39 A. D. 589; Robinson v. Adams, 62 Me. 369, 16 A. R. 473, 489; Hall v. Perry, 87 Me. 569, 47 A. S. R. 352.

MASSACHUSETTS: Baxter v. Abbott, 7 Gray, 71; Baldwin v. Parker, 99 Mass. 79, 96 A. D. 697 (semble); Bacon v. Bacon, 181 Mass. 18, 92 A. S. R. 397.



not prevail, and the burden of establishing insanity rests on the contestant.<sup>76a</sup>

**MICHIGAN:** *Taff v. Hosmer*, 14 Mich. 309; *McGinnis v. Kempsey*, 27 Mich. 363; *Moriarty v. Moriarty*, 108 Mich. 249; *Prentis v. Bates*, 93 Mich. 234, 245, *Thayer, Cas. Ev.* 105.

**MINNESOTA:** *In re Layman's Will*, 40 Minn. 371.

**MISSISSIPPI:** *Sheehan v. Kearney*, 21 So. 41, 35 L. R. A. 102 (statute).

**MISSOURI:** *Maddox v. Maddox*, 114 Mo. 35, 35 A. S. R. 734.

**NEBRASKA:** *Murry v. Hennessey*, 48 Neb. 608; *Seebrook v. Fedawa*, 30 Neb. 424.

**NEW HAMPSHIRE:** *Hardy v. Merrill*, 56 N. H. 227, 22 A. R. 441; *Perkins v. Perkins*, 39 N. H. 163.

**NEW YORK:** *Dobie v. Armstrong*, 160 N. Y. 584, 590 (semble); *Delafield v. Parish*, 25 N. Y. 9.

**OREGON:** *Chrisman v. Chrisman*, 16 Or. 127.

**TEXAS:** *Beazley v. Denson*, 40 Tex. 416; *Renn v. Samos*, 33 Tex. 760.

**VERMONT:** *Williams v. Robinson*, 42 Vt. 658, 1 A. R. 359, overruling *Dean v. Dean's Heirs*, 27 Vt. 746.

**WEST VIRGINIA:** *McMechen v. McMechen*, 17 W. Va. 683, 41 A. R. 682 (semble).

**WISCONSIN:** *Silverthorn's Will*, 68 Wis. 372 (semble); *Allen v. Griffin*, 69 Wis. 529 (semble).

See, however, *Howat v. Howat's Ex'r*, 19 Ky. L. R. 756, 41 S. W. 771.

The rule is unquestionably so, if the testator, when the will was made, had been adjudged insane and placed under guardianship. *Harrison v. Bishop*, 131 Ind. 161, 31 A. S. R. 422; *Crowninshield v. Crowninshield*, 2 Gray (Mass.) 524, *Thayer, Cas. Ev.* 100. The rule is the same, also, in a suit in equity to set aside a will that has been admitted to probate. *Irish v. Newell*, 62 Ill. 196, 14 A. R. 79, 82 (semble); *Pendlay v. Eaton*, 130 Ill. 69. *Contra*, *Roller v. Kling*, 150 Ind. 159; *Runyan v. Price*, 15 Ohio St. 1, 86 A. D. 459 (statute). And it prevails also in a statutory contest. *Tingley v. Cowgill*, 48 Mo. 291; *Norton v. Tingley*, 110 Mo. 456. *Contra*, *Blough v. Parry*, 144 Ind. 463; *Young v. Miller*, 145 Ind. 652.

While the rule stated in the text is announced in form in Connecticut, Illinois, and Kentucky, yet some cases in these states, by treating the presumption of sanity, not as affecting the burden of adducing evidence merely, but as constituting positive evidence in itself, virtually place the burden of establishing insanity on the contestant. In *re*

Even in those jurisdictions where the proponent bears the burden of proving sanity, yet he is not necessarily bound to adduce affirmative evidence of that fact. In many of these states proof of the formal execution of the will gives rise to a presumption of sanity and makes a *prima facie* case in favor of the proponent, and the burden of adducing evidence to overcome it rests upon the contestant.<sup>768</sup> In other jurisdic-

*Barber's Estate*, 63 Conn. 393, 22 L. R. A. 90; *Egbers v. Egbers*, 177 Ill. 82; *Taylor v. Pegram*, 154 Ill. 106; *Graybeal v. Gardner*, 146 Ill. 337; *Pendlay v. Eaton*, 130 Ill. 69; *Wilbur v. Wilbur*, 129 Ill. 392; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257. See *Sturdevant's Appeal from Probate*, 71 Conn. 392, *Thayer, Cas. Ev.* 95.

<sup>768</sup> ALABAMA: *Eastis v. Montgomery*, 95 Ala. 486, 36 A. S. R. 227; *Saxon v. Whitaker's Ex'r*, 30 Ala. 237.

INDIANA: *Teegarden v. Lewis*, 145 Ind. 98.

IOWA: *In re Coffman's Will*, 12 Iowa, 491; *Stephenson v. Stephenson*, 62 Iowa, 163.

MARYLAND: *Taylor v. Creswell*, 45 Md. 422.

NEW JERSEY: *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Elkinton v. Brick*, 44 N. J. Eq. 154, 1 L. R. A. 161; *Turner v. Cheesman*, 15 N. J. Eq. 243.

PENNSYLVANIA: *Egbert v. Egbert*, 78 Pa. 326; *Grabill v. Barr*, 5 Pa. 441, 47 A. D. 418 (semble); *Taylor v. Trich*, 165 Pa. 586, 44 A. S. R. 679, 686; *Grubbs v. McDonald*, 91 Pa. 236.

TENNESSEE: *Ford v. Ford*, 7 Humph. 91.

VIRGINIA: *Burton v. Scott*, 3 Rand. 399.

In the trial of an issue of *devisavit vel non*, the burden of proof as to insanity rests on the caveator. *McDaniel v. Crosby*, 19 Ark. 533; *Mayo v. Jones*, 78 N. C. 402.

In a statutory action to establish the validity of a testamentary probate, the burden of proving insanity rests on the defendant. *Dobie v. Armstrong*, 160 N. Y. 584.

In ejectment by a devisee against an heir, the burden of showing insanity of the testator rests on the heir. *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 4 A. D. 330.

<sup>769</sup> *Sutton v. Sadler*, 3 C. B. (N. S.) 87, *Thayer, Cas. Ev.* 97, 99; *O'Donnell v. Rodiger*, 76 Ala. 222, 52 A. R. 322; *Duffield v. Robeson*, 2 Har. (Del.) 375; *Rush v. Megee*, 36 Ind. 69; *Howat v. Howat's Ex'r*, 19 Ky. L. R. 756, 41 S. W. 771; *Fee v. Taylor*, 83 Ky. 259; *Baxter v. Abbott*, 7 Gray (Mass.) 71; *Hardy v. Merrill*, 56 N. H. 227, 22 A. R. 441; *Chrisman v. Chrisman*, 16 Or. 127; *Rees v. Stille*, 38 Pa. 138 (semble);

tions, however, a contrary view prevails. The presumption of sanity does not apply,—at least it is not given full effect,—and the proponent must accordingly adduce evidence of sanity,—slight evidence at least,—in the first instance.<sup>770</sup>

*harden v. Hays*, 9 Pa. 151; *Kaufman v. Caughman*, 49 S. C. 159, 61 A. S. R. 808.

The presumption of sanity does not thus apply in favor of the proponent, where the will was made by one under guardianship as an insane person, since the adjudication of insanity is *prima facie* evidence of that fact. *Harrison v. Bishop*, 131 Ind. 161, 31 A. S. R. 422; *Crowninshield v. Crowninshield*, 2 Gray (Mass.) 524, *Thayer*, Cas. Ev. 100, 105. See note 771, *infra*.

Inequality of bequests to next of kin does not raise a presumption of incompetency, so as to shift the burden of adducing evidence of competency upon the proponent. *Knox v. Knox*, 95 Ala. 495, 36 A. S. R. 235.

<sup>770</sup> CONNECTICUT: *Knox's Appeal from Probate*, 26 Conn. 20; *Comstock v. Hadlyme Ecc. Soc.*, 8 Conn. 254, 20 A. D. 100; *In re Barber's Estate*, 63 Conn. 393, 22 L. R. A. 90.

GEORGIA: *Evans v. Arnold*, 52 Ga. 169.

ILLINOIS: *Pendlay v. Eaton*, 130 Ill. 69 (statute).

KENTUCKY: *Hawkins v. Grimes*, 13 B. Mon. 257 (semble).

MAINE: *Gerrish v. Nason*, 22 Me. 438, 39 A. D. 589; *Cilley v. Cilley*, 34 Me. 162.

MICHIGAN: *Taff v. Hosmer*, 14 Mich. 309.

MINNESOTA: *In re Layman's Will*, 40 Minn. 371 (statute).

MISSOURI: *Norton v. Paxton*, 110 Mo. 456.

NEBRASKA: *Seebrook v. Fedawa*, 30 Neb. 424; *Murry v. Hennessey*, 48 Neb. 608, 611.

NEW YORK: *Delafield v. Parish*, 25 N. Y. 9.

TEXAS: *Beazley v. Denson*, 40 Tex. 416.

VERMONT: *Williams v. Robinson*, 42 Vt. 658, 1 A. R. 359.

WISCONSIN: *Silverthorn's Will*, 68 Wis. 372 (semble); *Allen v. Griffin*, 69 Wis. 529 (semble).

The later cases in Kentucky seem to disregard *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257. See note 769, *supra*.

If the proponent produces the subscribing witnesses to the will, who testify to its formal execution, and to the testator's apparent sanity, it constitutes a *prima facie* case, and the burden of adducing evidence of insanity shifts to the contestant. *In re Barber's Estate*, 63 Conn. 393, 22 L. R. A. 90; *Taylor v. Pegram*, 151 Ill. 106; *Harp v. Parr*, 168

## § 88. Continuance of insanity.

If insanity of a permanent nature is shown to have existed at a time in the past, a presumption of its continuance arises, in the absence of evidence to the contrary. Consequently, a party impeaching an act done by the person in question after that time thereby makes a *prima facie* case; and the burden of showing that the act was done after restoration to reason or in a lucid interval devolves upon the party who claims that the act is valid.<sup>771</sup> This presumption is rebuttable;<sup>772</sup> and it

ILL. 459; *Pendlay v. Eaton*, 130 Ill. 69; *King v. King*, 19 Ky. L. R. 868, 42 S. W. 347; *McFadin v. Catron*, 138 Mo. 197; *Perkins v. Perkins*, 39 N. H. 163; *Allen v. Griffin*, 69 Wis. 529.

The subscribing witnesses must be examined as to testator's sanity if they can be produced. *Perkins v. Perkins*, 39 N. H. 163.

If a will contains dispositions such as would cause insanity to be presumed, although capable of being justified by peculiar circumstances, the burden of proving sanity is on the proponent. *Chandler v. Barrett*, 21 La. Ann. 58, 99 A. D. 701.

<sup>771</sup> ENGLAND: *Attorney-General v. Parnter*, 3 Brown Ch. 441, 443; *Clarke v. Cartwright*, 1 Phillim. Ecc. 90, 1 Eng. Ecc. R. 47, 51; *Hall v. Warren*, 9 Ves. 605; *White v. Wilson*, 13 Ves. 87.

IRELAND: *Walcot v. Alleyn*, Milw. 65, 69.

UNITED STATES: *Hoge's Lessee v. Fisher*, Pet. C. C. 163, Fed. Cas. No. 6,585.

ALABAMA: *Wray v. Wray*, 33 Ala. 187; *Pike v. Pike*, 104 Ala. 642; *Rawdon v. Rawdon*, 28 Ala. 565; *Eastis v. Montgomery*, 95 Ala. 486, 36 A. S. R. 227; *Saxon v. Whitaker's Ex'r*, 30 Ala. 237; *O'Donnell v. Rodiger*, 76 Ala. 222, 52 A. R. 322.

CONNECTICUT: *State v. Johnson*, 40 Conn. 136.

DELAWARE: *Duffield v. Robeson*, 2 Har. 375.

FLORIDA: *Armstrong v. State*, 30 Fla. 170, 17 L. R. A. 484.

GEORGIA: *Dicken v. Johnson*, 7 Ga. 484; *Norman v. Ga. L. & T. Co.*, 92 Ga. 295, 297.

ILLINOIS: *Emery v. Hoyt*, 46 Ill. 258.

INDIANA: *Sheets v. Bray*, 125 Ind. 33; *Crouse v. Holman*, 19 Ind. 30; *Stumph v. Miller*, 142 Ind. 442, 445; *Roller v. Kling*, 150 Ind. 159; *Rush v. Megee*, 36 Ind. 69.

KANSAS: *Lantis v. Davidson*, 60 Kan. 389.

KENTUCKY: *Carpenter v. Carpenter*, 8 Bush, 283.

does not arise if insanity shown to have existed in the past also appears to have been the result of temporary causes.<sup>77a</sup>

LOUISIANA: *Chandler v. Barrett*, 21 La. Ann. 58, 99 A. D. 701.

MAINE: *Weston v. Higgins*, 40 Me. 102, 105.

MARYLAND: *Brown v. Ward*, 53 Md. 376, 36 A. R. 422; *Taylor v. Creswell*, 45 Md. 422.

MASSACHUSETTS: *Wright v. Wright*, 139 Mass. 177, 182; *Little v. Little*, 13 Gray, 264, 266.

MINNESOTA: *State v. Hayward*, 62 Minn. 474.

MISSISSIPPI: *Ford v. State*, 73 Miss. 734, 35 L. R. A. 117; *Mullins v. Cottrell*, 41 Miss. 291; *Ricketts v. Jolliff*, 62 Miss. 440.

MISSOURI: *State v. Schaefer*, 116 Mo. 96.

NEW JERSEY: *Turner v. Cheesman*, 15 N. J. Eq. 243; *State v. Spencer*, 21 N. J. Law, 196; *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Elkinton v. Brick*, 44 N. J. Eq. 154, 1 L. R. A. 161.

NEW YORK: *Jackson v. Van Dusen*, 5 Johns. 144, 4 A. D. 330; *Jackson v. King*, 4 Cow. 207, 15 A. D. 354; *Clark v. Fisher*, 1 Paige, 171, 19 A. D. 402.

NORTH CAROLINA: *Smith v. Smith*, 108 N. C. 365, 368; *Den d. Ballew v. Clark*, 24 N. C. (2 Ired.) 23.

OHIO: *Hosler v. Beard*, 54 Ohio St. 398, 56 A. S. R. 720.

OREGON: *Clark's Heirs v. Ellis*, 9 Or. 128.

PENNSYLVANIA: *Harden v. Hays*, 9 Pa. 151; *Rogers v. Walker*, 6 Pa. 371, 47 A. D. 470; *Grabill v. Barr*, 5 Pa. 441, 47 A. D. 418.

TENNESSEE: *Wright v. Market Bank (Ch. App.)* 60 S. W. 623.

VIRGINIA: *Fishburne v. Ferguson's Heirs*, 84 Va. 87.

WEST VIRGINIA: *Anderson v. Cranmer*, 11 W. Va. 562; *Jarrett v. Jarrett*, 11 W. Va. 584.

WISCONSIN: *Wright v. Jackson*, 59 Wis. 569; *Ripley v. Babcock*, 13 Wis. 425.

The same rule applies to monomania or insane delusion. *Boughton v. Knight*, L. R. 3 Prob. & Div. 64; *Smith v. Tebbitt*, L. R. 1 Prob. & Div. 398; *Thornton v. Appleton*, 29 Me. 298, 300; *Jenckes v. Probate Ct.*, 2 R. I. 255; *State v. Wilner*, 40 Wis. 304. See, however, *Gillespie v. Shuliberrier*, 50 N. C. (5 Jones) 157.

After inquest found, the presumption is that the person in question is insane. *Lilly v. Waggoner*, 27 Ill. 395; *Breed v. Pratt*, 18 Pick. (Mass.) 115. See note 769, *supra*.

Ordinarily, in cases of permanent insanity, proof of a lucid interval does not raise a presumption of lucidity at a later time. *Pike v. Pike*, 104 Ala. 642; *Saxon v. Whitaker's Ex'r*, 30 Ala. 237; *Harden v. Hays*, 9 Pa. 151. See, however, *Wright v. Jackson*, 59 Wis. 569.

## T. USE AND POSSESSION.

## § 89. Presumption of ownership from mere possession.

In the absence of other evidence as to the title to property, a claimant makes a *prima facie* case of title in himself by show-

Evidence of insanity subsequent to the transaction in suit is admissible, under some conditions, to show insanity at that time. *Taylor v. Creswell*, 45 Md. 422; *Com. v. Pomeroy*, 117 Mass. 143. See § 34, *supra*.

It has been held that the presumption of continuance of insanity is one of fact merely; that is, a mere inference based on circumstantial evidence, and not a presumption of law. *Manley's Ex'r v. Staples*, 65 Vt. 370.

<sup>772</sup> *Snow v. Benton*, 28 Ill. 306.

The presumption of continued insanity arising from an adjudication thereof may be rebutted by other evidence than an adjudication of restoration to reason. *Rodgers v. Rodgers*, 56 Kan. 483; *Mut. L. Ins. Co. v. Wiswell*, 56 Kan. 765. Thus, if the adjudged lunatic afterwards marries and lives with the wife for thirty years or more, the presumption is rebutted, and the marriage is presumptively legal. *Castor v. Davis*, 120 Ind. 231. And the same has been held where insanity both before and after the marriage is proven. *Ward v. Dulaney*, 23 Miss. 410.

Reasonableness of the act done by the party in question may be evidence of lucidity at the particular time. *Clarke v. Cartwright*, 1 Phillim. Ecc. 90, 1 Eng. Ecc. R. 47, 51; *Walcot v. Alleyn*, Milw. 65, 70; *Bey's Succession*, 46 La. Ann. 773, 24 L. R. A. 577; *Wright v. Jackson*, 59 Wis. 569, 583. And see note 773, *infra*.

<sup>773</sup> IRELAND: *Walcot v. Alleyn*, Milw. 65, 69.

UNITED STATES: *Lewis v. Baird*, 3 McLean, 56, Fed. Cas. No. 8,316.

ALABAMA: *Ford v. State*, 71 Ala. 385.

CALIFORNIA: *People v. Francis*, 38 Cal. 183; *People v. Schmitt*, 106 Cal. 48.

DELAWARE: *Duffield v. Robeson*, 2 Har. 375.

ILLINOIS: *Taylor v. Pegram*, 151 Ill. 106; *Irish v. Newell*, 62 Ill. 196, 14 A. R. 79.

INDIANA: *Crouse v. Holman*, 19 Ind. 30.

KENTUCKY: *Carpenter v. Carpenter*, 8 Bush, 283.

MAINE: *Staples v. Wellington*, 58 Me. 453.

MARYLAND: *Brown v. Ward*, 53 Md. 376, 36 A. R. 422; *Turner v. Rusk*, 53 Md. 65; *Townshend v. Townshend*, 7 Gill, 10.

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ing that at the time the cause of action accrued he was in peaceable possession of the property. In other words, peaceable possession of property raises a presumption of ownership where other evidence of the title is not adduced. And this presumption applies to all sorts of property, real and personal.

**(a) Personal property.** In the absence of other evidence of title, peaceable possession of personal property, under a claim of right, though not for a period sufficient to give title by limitation or prescription, raises a presumption of ownership in the possessor.<sup>774</sup> By showing a peaceable possession prior to

MASSACHUSETTS: *Hix v. Whittemore*, 4 Metc. 545; *Little v. Little*, 13 Gray, 264, 266.

MINNESOTA: *State v. Hayward*, 62 Minn. 474.

MISSISSIPPI: *Ford v. State*, 73 Miss. 734, 35 L. R. A. 117.

MISSOURI: *State v. Howard*, 118 Mo. 127.

OREGON: *Clark's Heirs v. Ellis*, 9 Or. 128.

TENNESSEE: *Wright v. Market Bank* (Ch. App.) 60 S. W. 623.

TEXAS: *Leache v. State*, 22 Tex. App. 279.

VERMONT: *Manley's Ex'r v. Staples*, 65 Vt. 370, 374.

WISCONSIN: *State v. Wilner*, 40 Wis. 304.

Evidence of fixed habits of intemperance for a long period preceding the transaction in suit does not make a prima facie case of incompetency at that time; much less does evidence of occasional drunkenness. *State v. Reddick*, 7 Kan. 143, 151; *Lee's Will*, 46 N. J. Eq. 193; *Elkinton v. Brick*, 44 N. J. Eq. 154, 1 L. R. A. 161; *Noel v. Karper*, 53 Pa. 97. See, however, *Cochran's Will*, 7 T. B. Mon. (Ky.) 264, 15 A. D. 116.

Where incapacity at a time prior to the transaction in suit is shown, but the defect is not continuous in its nature, and the act impeached is in itself reasonable, and so furnishes no intrinsic evidence of incompetency, the burden of showing incapacity at the time of the transaction in suit is upon the party assailing the act. *Chandler v. Barrett*, 21 La. Ann. 58, 99 A. D. 701; *Trimbo v. Trimbo*, 47 Minn. 389; *Stewart v. Flint*, 59 Vt. 144.

The question of the permanency of the disease is one for the jury. *Townshend v. Townshend*, 7 Gill (Md.) 10; *Manley's Ex'r v. Staples*, 65 Vt. 370.

<sup>774</sup> *Pilcher v. Hickman*, 132 Ala. 574, 90 A. S. R. 930; *Avery v.*

the acts complained of, the plaintiff therefore makes a prima facie right to recover in an action of replevin, trover, or trespass, according to the circumstances of the case.<sup>775</sup>

Clemons, 18 Conn. 306, 46 A. D. 323; Johnson v. Chicago & N. W. R. Co., 77 Iowa, 666; Alexander's Succession, 18 La. Ann. 337; Millay v. Butts, 35 Me. 139; Linscott v. Trask, 35 Me. 150; Horsey v. Knowles, 74 Md. 602; Magee v. Scott, 9 Cush. (Mass.) 148, 55 A. D. 49; Mount v. Harris, 1 Smedes & M. (Miss.) 185, 40 A. D. 89; Dick v. Cooper, 24 Pa. 217, 64 A. D. 652; Moon v. Hawks, 2 Aiken (Vt.) 390, 16 A. D. 725; Wausau Boom Co. v. Plumer, 35 Wis. 274.

The presumption may arise in criminal cases. People v. Oldham, 111 Cal. 648; Com. v. Blanchette, 157 Mass. 486.

The presumption applies with reference to wild animals in possession. James v. Wood, 82 Me. 173, 8 L. R. A. 448. Also with reference to ships. Bailey v. Steamer New World, 2 Cal. 370.

Mere possession of a transcript of a judgment raises no presumption that the possessor has any interest entitling him to sue on the judgment. Tally v. Reynolds, 1 Ark. 99, 31 A. D. 737.

The presumption is that money deposited as bail for a prisoner by a third person, and receipted for to him, belongs to him, and not to the prisoner. McAlmond v. Bevington, 23 Wash. 315, 53 L. R. A. 597.

The assent of executors to a specific legacy is presumed, where the legatee is in possession under it. Schley v. Collis, 47 Fed. 250, 13 L. R. A. 567.

In the absence of evidence on the question of possession, the presumption is that it is in the holder of the legal title. Reid v. State, 20 Ga. 681.

*Ownership and operation of wagons and railroads.* If the name of a person or corporation appears on wagons or rolling stock, the presumption is that he or it is the owner and in possession. Pittsburgh, F. W. & C. R. Co. v. Callaghan, 157 Ill. 406; Ryan v. Baltimore & O. R. Co., 60 Ill. App. 612; Schweinfurth v. Dover, 91 Ill. App. 319. And see Seaman v. Koehler, 122 N. Y. 646; Harlinger v. N. Y. Cent. & H. R. R. Co., 15 Wkly. Dig. 392, affirmed 92 N. Y. 661; Diel v. Henry Zeltner Brew. Co., 30 App. Div. 291, 51 N. Y. Supp. 930. This presumption is rebuttable. Foster v. Wadsworth-Howland Co., 168 Ill. 514; Chicago Gen. St. R. Co. v. Capek, 68 Ill. App. 500. It is also presumed that cars running on the track of a particular railroad company are operated by it. Walsh v. Mo. Pac. R. Co., 102 Mo. 582; Peabody v. Or. R. & N. Co., 21 Or. 121, 12 L. R. A. 823; Ferguson v. Wis. Cent. R. Co., 63 Wis. 145.

<sup>775</sup> *Replevin.* Schulenberg v. Harriman, 21 Wall. (U. S.) 44, 59;



The presumption is sometimes applied to transactions between husband and wife.<sup>776</sup> Thus, if the husband, with the wife's consent or acquiescence, uses or disposes of her property as his own, a presumption arises that she has given it to him.<sup>777</sup>

The rule applies to negotiable instruments as well as to other property. The possession of such an instrument payable to the holder by name, or to bearer, or to a named person and indorsed by him, gives rise to a presumption that the holder is the owner of the paper and entitled to recover thereon.<sup>778</sup>

*Drummond v. Hopper*, 4 Har. (Del.) 327; *Clifton v. Lilley*, 12 Tex 130; *Andrews v. Beck*, 23 Tex. 455.

*Trespass*. *Gilson v. Wood*, 20 Ill. 37. Title to support trespass q. c. f., see page 345, *infra*.

*Trover*. *Webb v. Fox*, 7 Term R. 391, 397; *Goodwin v. Garr*, 8 Cal. 615; *Vining v. Baker*, 53 Me. 544.

See page 343, *infra*, as to the conclusiveness of the presumption in these actions.

<sup>776</sup> *Farwell v. Cramer*, 38 Neb. 61.

If, however, the wife owns a farm, and the husband manages it, the presumption is that she owns the products. *Hill v. Chambers*, 30 Mich. 422, 428.

<sup>777</sup> *Kuhn v. Stansfield*, 28 Md. 210, 92 A. D. 681; *Clark v. Patterson*, 158 Mass. 388, 35 A. S. R. 498. And see *McLure v. Lancaster*, 24 S. C. 273, 58 A. R. 259.

The presumption applies to money of the wife, the same as to other effects. *Hauer's Estate*, 140 Pa. 420, 23 A. S. R. 245; *Beecher v. Wilson*, 84 Va. 813, 10 A. S. R. 883; *Bennett v. Bennett*, 37 W. Va. 396, 38 A. S. R. 47. And see *Bromwell v. Bromwell*, 139 Ill. 424; *Lishey v. Lishey*, 2 Tenn. Ch. 5; *Lyon v. Green Bay & M. R. Co.*, 42 Wis. 548. The wife may, however, permit the husband to take possession of her funds for safe-keeping or investment without raising a presumption of gift. *Springfield Inst. v. Copeland*, 160 Mass. 380, 39 A. S. R. 489; *Bergey's Appeal*, 60 Pa. 408, 100 A. D. 578.

In some cases a view contrary to the text seems to be taken. *Adoue v. Sprencer*, 62 N. J. Eq. 782, 90 A. S. R. 484; *Wormley's Estate*, 137 Pa. 101.

<sup>778</sup> UNITED STATES: *Brooklyn City & N. R. Co. v. Nat. Bank*, 102 U. S. 14, 38.

The presumption arises only when the fact of possession is unexplained. If the surrounding circumstances make it as

COLORADO: *Perot v. Cooper*, 17 Colo. 80, 31 A. S. R. 258.

ILLINOIS: *Gillham v. State Bank*, 2 Scam. 245, 35 A. D. 105; *Comer v. Comer*, 120 Ill. 420.

INDIANA: *Conwell v. Pumphrey*, 9 Ind. 135, 68 A. D. 611.

IOWA: *Stoddard v. Burton*, 41 Iowa, 582; *Bigelow v. Burnham*, 90 Iowa, 300, 48 A. S. R. 442.

LOUISIANA: *Bolton v. Harrod*, 9 Mart. 326, 13 A. D. 306; *Squier v. Stockton*, 5 La. Ann. 120, 52 A. D. 583.

MARYLAND: *Ellicott v. Martin*, 6 Md. 509, 61 A. D. 327; *Kunkel v. Spooner*, 9 Md. 462, 66 A. D. 332.

MASSACHUSETTS: *Pettee v. Prout*, 3 Gray, 502, 63 A. D. 778; *Holcomb v. Beach*, 112 Mass. 450.

MICHIGAN: *Barnes v. Peet*, 77 Mich. 391; *Hovey v. Sebring*, 24 Mich. 232, 9 A. R. 122.

MINNESOTA: *Estes v. Lovering Shoe Co.*, 59 Minn. 504, 50 A. S. R. 424 (statute).

MISSISSIPPI: *Emanuel v. White*, 34 Miss. 56, 69 A. D. 385.

NEBRASKA: *Saunders v. Bates*, 54 Neb. 209.

NEW JERSEY: *Halsted's Ex'rs v. Colvin*, 51 N. J. Eq. 387.

NEW YORK: *Cruger v. Armstrong*, 3 Johns. Cas. 5, 2 A. D. 126; *James v. Chalmers*, 6 N. Y. 209.

NORTH CAROLINA: *Commercial Bank v. Burgwyn*, 108 N. C. 62, 23 A. S. R. 49; *Threadgill v. Anson County Com'rs*, 116 N. C. 616; *Pugh v. Grant*, 86 N. C. 39.

TEXAS: *Johnson v. Mitchell*, 50 Tex. 212.

This presumption seems to apply to certificates of corporate stock properly indorsed. *Walker v. Detroit Transit R. Co.*, 47 Mich. 338.

The presumption does not apply to the holder of a negotiable instrument payable to a named person and not indorsed by him. *Welch v. Lindo*, 7 Cranch (U. S.) 159; *Turnley v. Black*, 44 Ala. 159; *School Dist. v. Reeve*, 56 Ark. 68; *Hull v. Conover's Ex'rs*, 35 Ind. 372; *Jones v. Jones*, 19 Ky. L. R. 1516, 43 S. W. 412, 414; *Vastine v. Wilding*, 45 Mo. 89, 100 A. D. 347; *Dodge v. Nat. Exch. Bank*, 30 Ohio St. 1; *Ross v. Smith*, 19 Tex. 171, 70 A. D. 327. And see *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 A. S. R. 113; *Ball v. Hill*, 38 Tex. 237. *Contra*, *Rubey v. Culbertson*, 35 Iowa, 264 (semble); *O'Keeffe v. First Nat. Bank*, 49 Kan. 347, 33 A. S. R. 370; *Jackson v. Love*, 82 N. C. 405, 33 A. R. 685. In North Carolina, where the instrument is not indorsed by the payee, the presumption of ownership

probable as not that the ownership is in some one out of possession, then the possessor is not presumed to be the owner.<sup>779</sup> For instance, the possession of a factor, broker, or other person who openly acts as agent in the regular course of his business, may be referred as reasonably to ownership in a principal as to ownership in himself, and therefore no presumption arises.<sup>780</sup> So, if it appears that the person in possession of property wrongfully seized it while it was in the peaceable possession of another, the subsequent possession of the wrongdoer does not create a presumption of ownership as against the original possessor.<sup>781</sup>

arising from possession applies in favor of the holder as against the maker, but not as against the payee. *Holly v. Holly*, 94 N. C. 670.

The presumption arises with reference to a note payable to a named person or bearer, and placed by the payee in the hands of his agent. Prima facie, the agent has authority to collect it. *Stiger v. Bent*, 111 Ill. 328; *Cone v. Brown*, 15 Rich. Law (S. C.) 262. *Contra*, *Jackson v. Bank*, 92 Tenn. 154, 36 A. S. R. 81. This rule is otherwise as to authority to collect a nonnegotiable bond. *Belt v. Wilson's Adm'r*, 6 J. J. Marsh. (Ky.) 495; *Brown v. Taylor's Committee*, 32 Grat. (Va.) 135. And it does not apply to a check not indorsed by the payee. *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151, 93 A. S. R. 113.

Possession of a negotiable instrument by one other than the maker is prima facie evidence of nonpayment. *Tisdale v. Maxwell*, 58 Ala. 40; *Turner v. Turner*, 79 Cal. 565; *Stiger v. Bent*, 111 Ill. 328; *Somervall v. Gillies*, 31 Wis. 152.

Presumption of purchase in good faith for value before maturity, see § 30(e), *supra*.

Possession of note as evidence of delivery, see § 30(c), *supra*.

<sup>779</sup> *Rawley v. Brown*, 71 N. Y. 85; *N. Y. & H. R. Co. v. Haws*, 56 N. Y. 175.

<sup>780</sup> *Skiff v. Stoddard*, 63 Conn. 198, 21 L. R. A. 102; *Boisblanc's Succession*, 32 La. Ann. 109.

Possession by an agent is prima facie evidence of title in the principal. *Barton v. People*, 135 Ill. 405, 25 A. S. R. 375; *Kunkel v. Spooner*, 9 Md. 462, 66 A. D. 332. And see *Threadgill v. Anson County Com'rs*, 116 N. C. 616.

As against the true owner, the presumption is rebuttable. Its effect is to cast on him the burden of adducing evidence tending to show that the possessor was not the real owner of the property.<sup>782</sup> As against all others than the true owner or those claiming under him, the presumption is said to be conclusive; that is to say, it is a rule of substantive law that no one but the true owner or those claiming under him may dispute a possessor's title. Accordingly, a person who was in lawful possession of property at the time the cause of action arose may ordinarily recover against a mere wrongdoer or trespasser in an action of replevin,<sup>783</sup> of trover,<sup>784</sup> or of tres-

<sup>781</sup> *Cumberledge v. Cole*, 44 Iowa, 181. And see *Weston v. Higgins*, 40 Me. 102.

<sup>782</sup> *Bergen v. Riggs*, 34 Ill. 170, 85 A. D. 304; *Comer v. Comer*, 120 Ill. 420; *Linscott v. Trask*, 35 Me. 150; *Magee v. Scott*, 9 Cush. (Mass.) 148, 55 A. D. 49; *Hovey v. Sebring*, 24 Mich. 232, 9 A. R. 122; *Mount v. Harris*, 1 Smedes & M. (Miss.) 185, 40 A. D. 89; *Karch's Estate*, 133 Pa. 84. And see *Barnes v. Peet*, 77 Mich. 391; *Cone v. Brown*, 15 Rich. Law (S. C.) 262.

The true owner may claim the property, saving money or negotiable instruments properly indorsed or transferable by delivery, even as against a purchaser from the one in possession, in the absence of facts creating an estoppel. *Wright v. Solomon*, 19 Cal. 64, 79 A. D. 196; *Fawcett v. Osborn*, 32 Ill. 411, 83 A. D. 278; *Johnson v. Frisbie*, 29 Md. 76, 96 A. D. 508; *Hanson v. Chiatovich*, 13 Nev. 395; *Sprights v. Hawley*, 39 N. Y. 441, 100 A. D. 452; *Williams v. Merle*, 11 Wend. (N. Y.) 80, 25 A. D. 604, and note; *Velsian v. Lewis*, 15 Or. 539, 3 A. S. R. 184; *Agnew v. Johnson*, 22 Pa. 471, 62 A. D. 303; *Carmichael v. Buck*, 10 Rich. Law (S. C.) 332, 70 A. D. 226.

<sup>783</sup> *Van Namee v. Bradley*, 69 Ill. 299; *Moorman v. Quick*, 20 Ind. 67; *Van Baalen v. Dean*, 27 Mich. 104; *Summons v. Beaubien*, 36 Mo. 307; *Rogers v. Arnold*, 12 Wend. (N. Y.) 30 (semble); *Cox v. Fay*, 54 Vt. 446. *Contra*, *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; *Loomis v. Youle*, 1 Minn. 175 (Gil. 150). See, also, page 339, *supra*.

<sup>784</sup> *Armory v. Delamirie*, 1 Strange, 505; *Webb v. Fox*, 7 Term R. 391; *Sutton v. Buck*, 2 Taunt. 302; *Cook v. Patterson*, 35 Ala. 102; *Carter v. Bennett*, 4 Fla. 283; *Harker v. Dement*, 9 Gill (Md.) 7, 52 A. D. 670; *Burke v. Savage*, 13 Allen (Mass.) 408; *Bartlett v. Hoyt*, 29

pass,<sup>785</sup> according to the circumstances, even though he shows no title; and the plaintiff's want of a general ownership or a special ownership other than that arising out of his possession is not a defense unless the defendant can show a better right.

(b) **Real property.** In the absence of other evidence of title, peaceable possession of real estate under a claim of right, though not for a period sufficient to give title by limitation or prescription, raises a presumption of ownership in the occupant.<sup>786</sup> The extent of the ownership which is presumed de-

N. H. 317; *Duncan v. Spear*, 11 Wend. (N. Y.) 54; *O'Brien v. Hilburn*, 22 Tex. 616. See, also, page 339, *supra*.

In North Carolina, mere possession will justify a recovery in trover only where the true owner is unknown. *Hostler's Adm'r v. Skull*, 1 N. C. 183 (Tayl. 152), 3 N. C. (2 Hayw.) 179, 1 A. D. 583; *Branch v. Morrison*, 50 N. C. (5 Jones) 16, 69 A. D. 770.

<sup>785</sup> *Nelson v. Cherrill*, 1 Moore & S. 452, 8 Bing. 316; *Miller v. Kirby*, 74 Ill. 242; *Gilson v. Wood*, 20 Ill. 37; *Staples v. Smith*, 48 Me. 470; *Perkins v. Weston*, 3 Cush. (Mass.) 549 (semble); *Boston v. Neat*, 12 Mo. 125; *Barron v. Cobleigh*, 11 N. H. 557, 35 A. D. 505; *Buck v. Aikin*, 1 Wend. (N. Y.) 466, 19 A. D. 535; *Carson v. Prater*, 6 Cold. (Tenn.) 565; *Potter v. Washburn*, 13 Vt. 558, 37 A. D. 615. See, also, page 339, *supra*.

Evidence of title to support trespass q. c. f., see page 345, *infra*.

<sup>786</sup> *Ricard v. Williams*, 7 Wheat. (U. S.) 59; *Hewes v. Glos*, 170 Ill. 436, 439; *Hunt v. Utter*, 15 Ind. 318; *Hawkins v. Berkshire County Com'rs*, 2 Allen (Mass.) 254; *Perry v. Weeks*, 137 Mass. 584; *Bell v. Skillicorn*, 6 N. M. 399; *Tuttle v. Jackson*, 6 Wend. (N. Y.) 213, 21 A. D. 306; *Jackson v. Town*, 4 Cow. (N. Y.) 599, 15 A. D. 405; *Jackson v. Denn*, 5 Cow. (N. Y.) 200; *Schlichter v. Kelter*, 156 Pa. 119, 22 L. R. A. 161; *Phila. & R. R. Co. v. Obert*, 109 Pa. 193; *Ward's Heirs v. McIntosh*, 12 Ohio St. 231; *Austin v. Bailey*, 37 Vt. 219, 86 A. D. 703; *Teass v. St. Albans*, 38 W. Va. 1, 19 L. R. A. 802.

In California and Texas, all property acquired during marriage is presumed to belong to the community. *Althof v. Conheim*, 38 Cal. 230, 99 A. D. 363; *Morris v. Hastings*, 70 Tex. 26, 8 A. S. R. 570.

The holder of the legal title is presumed to have been in possession of the property, in the absence of evidence on the question. *Finch's Ex'rs v. Alston*, 2 Stew. & P. (Ala.) 83, 23 A. D. 299, 302; *Miller v. Fraley*, 23 Ark. 735; *Bardeen v. Markstrum*, 64 Wis. 613.

pend, in the absence of evidence to the contrary, upon the extent of the occupant's claim of right.<sup>787</sup> If, therefore, the occupant claims ownership in fee, the presumption is that he owns the fee.<sup>788</sup>

As against a subsequent trespasser who does not connect himself with the legal title, the presumption is said to be conclusive, so that the occupant of real estate, at least if he is in possession under a claim of right, may therefore maintain ejectment<sup>789</sup> or trespass<sup>790</sup> without showing title. His prior posses-

<sup>787</sup> See *Lincoln v. Thompson*, 75 Mo. 613.

<sup>788</sup> *Ricard v. Williams*, 7 Wheat. (U. S.) 59; *Jackson v. Porter*, 1 Paine, 457, Fed. Cas. No. 7,143; *Ward's Heirs v. McIntosh*, 12 Ohio St. 231.

In the absence of evidence to the contrary, possession is prima facie evidence of title in fee. *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Day v. Alverson*, 9 Wend. (N. Y.) 223.

<sup>789</sup> ENGLAND: *Davison v. Gent*, 1 Hurl. & N. 744; *Asher v. Whitlock*, L. R. 1 Q. B. 1.

ALABAMA: *Eakin v. Brewer*, 60 Ala. 579; *Wilson v. Glenn*, 68 Ala. 383; *McCall v. Pryor*, 17 Ala. 533.

ARKANSAS: *Jacks v. Dyer*, 31 Ark. 334.

CALIFORNIA: *Plume v. Seward*, 4 Cal. 94, 60 A. D. 599; *Hutchinson v. Perley*, 4 Cal. 33, 60 A. D. 578; *Hubbard v. Barry*, 21 Cal. 321; *Potter v. Knowles*, 5 Cal. 87.

FLORIDA: *Seymour v. Creswell*, 18 Fla. 29.

GEORGIA: *Jones v. Easley*, 53 Ga. 454; *Doe d. Johnson v. Lancaster*, 5 Ga. 39; *Jones' Adm'rs v. Nunn*, 12 Ga. 469; *Bagley v. Kennedy*, 85 Ga. 703.

MISSISSIPPI: *Kerr v. Farish*, 52 Miss. 101; *Hicks v. Steigleman*, 49 Miss. 377.

MISSOURI: *Crockett v. Morrison*, 11 Mo. 3.

NEW JERSEY: *Den d. Cain v. McCann*, 3 N. J. Law, 331, 4 A. D. 384.

NEW YORK: *Day v. Alverson*, 9 Wend. 223; *Jackson v. Harder*, 4 Johns. (N. Y.) 202, 4 A. D. 262.

OHIO: *Newman's Lessee v. Cincinnati*, 18 Ohio, 323.

PENNSYLVANIA: *Hoey v. Furman*, 1 Pa. 295.

VERMONT: *Reed v. Shepley*, 6 Vt. 602; *Warner v. Page*, 4 Vt. 291, 24 A. D. 607.

WISCONSIN: *Elofrson v. Lindsay*, 90 Wis. 203; *Bates v. Campbell*, 25 Wis. 613.

sion entitles him to recover. It should be observed in this connection that conclusive presumptions, so called, are not true presumptions, but rules of substantive law.<sup>701</sup>

**§ 90. Presumption of lost grant from circumstantial evidence.**

(a) **General rules.** It has been seen that, in the absence of other evidence of title, possession raises a presumption of ownership in the occupant.<sup>702</sup> If, however, the title appears to be in some one else, the occupant is under the necessity of adducing other evidence of his own title than the mere fact of his possession.<sup>703</sup> A conveyance to the occupant or some one of his predecessors in the claim may be proved by indirect or

In some states, however, mere possession will not sustain ejectment unless it has continued so long as to give title under the statute of limitations. *Doe d. Jefferson v. Howell*, 1 *Houst. (Del.)* 178.

The possession must be actual. *Seymour v. Creswell*, 18 *Fla.* 29; *Burke v. Hammond*, 76 *Pa.* 172; *Wilson v. Palmer*, 18 *Tex.* 592. But one may maintain ejectment, even though he has acquired and held possession not in person, but only through a tenant claiming under him. *McLawrin v. Salmons*, 11 *B. Mon. (Ky.)* 96, 52 *A. D.* 563.

<sup>700</sup> *Elliott v. Kemp*, 7 *Mees. & W.* 306, 312 (semble); *Graham v. Peat*, 1 *East*, 244; *Finch's Ex'rs v. Alston*, 2 *Stew. & P. (Ala.)* 83, 23 *A. D.* 299; *Duncan v. Potts*, 5 *Stew. & P. (Ala.)* 82, 24 *A. D.* 766; *Willsons v. Bibb*, 1 *Dana (Ky.)* 7, 25 *A. D.* 118; *Heath v. Williams*, 25 *Me.* 209, 43 *A. D.* 265; *Hayward v. Sedgley*, 14 *Me.* 439, 31 *A. D.* 64; *Currier v. Gale*, 9 *Allen (Mass.)* 522; *Wendell v. Blanchard*, 2 *N. H.* 456; *Evertson v. Sutton*, 5 *Wend. (N. Y.)* 281, 21 *A. D.* 217; *Clay v. St. Albans*, 43 *W. Va.* 539, 64 *A. S. R.* 883.

Evidence of title to support trespass to personal property, see pages 339, 343, *supra*.

*Trespass on the case.* *Allen v. McCorkle*, 3 *Head (Tenn.)* 181; *Moore v. Chicago, M. & St. P. R. Co.*, 78 *Wis.* 120.

<sup>701</sup> See page 343, *supra*, as to the analogous rule as to possession of personal property.

As to conclusive presumptions, so called, in general, see § 12(a), *supra*.

<sup>702</sup> Section 89(b), *supra*.

<sup>703</sup> *Cahill v. Cahill*, 75 *Conn.* 522, 60 *L. R. A.* 706.

circumstantial evidence, as well as by production of the title deeds or authenticated copies or records of them. In thus proving a conveyance, ancient possession under a claim of right is an important factor, and may, in connection with other circumstances, justify the jury in presuming, as a matter of fact, that the legal owner or some one of his predecessors has, by a deed which has been lost, conveyed the property to the occupant or some one of those under whom he claims.<sup>794</sup>

This presumption is often applied in a class of cases where

<sup>794</sup> ENGLAND: *Tenny v. Jones*, 3 Moore & S. 472; *Goodwin v. Baxter*, 2 W. Bl. 1228.

UNITED STATES: *Fletcher v. Fuller*, 120 U. S. 534; *Ricard v. Williams*, 7 Wheat. 59; *Hurst's Lessee v. McNeill*, 1 Wash. C. C. 70, Fed. Cas. No. 6,936.

CONNECTICUT: *Cahill v. Cahill*, 75 Conn. 522, 60 L. R. A. 706; *Bunce v. Wolcott*, 2 Conn. 27.

ILLINOIS: *Jefferson County v. Ferguson*, 13 Ill. 33.

INDIANA: *Nelson v. Fleming*, 56 Ind. 310.

MAINE: *Farrar v. Merrill*, 1 Me. 17.

MASSACHUSETTS: *Melvin v. Locks & Canals on Merrimack River*, 17 Pick. 255, 16 Pick. 137; *White v. Loring*, 24 Pick. 319.

MISSOURI: *Newman v. Studley*, 5 Mo. 291; *McNair v. Hunt*, 5 Mo. 301; *Brown v. Oldham*, 123 Mo. 621.

NEW HAMPSHIRE: *Wendell v. Moulton*, 26 N. H. 41.

NEW YORK: *Ham v. Schuyler*, 4 Johns. Ch. 1; *Jackson v. McCall*, 10 Johns. 377, 6 A. D. 343.

OHIO: *Courcier v. Graham*, 1 Ohio, 330, 349.

PENNSYLVANIA: *Kingston v. Lesley*, 10 Serg. & R. 383; *Burke v. Hammond*, 76 Pa. 172; *Carter v. Tincum Fishing Co.*, 77 Pa. 310.

SOUTH CAROLINA: *Riddlehoover v. Kinard*, 1 Hill Eq. 376.

VERMONT: *Townsend v. Downer's Adm'r*, 32 Vt. 183; *Sellick v. Starr*, 5 Vt. 255; *University of Vt. v. Reynold's Ex'r*, 3 Vt. 542, 23 A. D. 234.

The presumption may be indulged, as between the parties at least, even though the conveyance is of a kind which falls within the scope of the recording acts. *Ryder v. Hathaway*, 21 Pick. (Mass.) 298, 303.

A will and administration of the decedent's estate may be presumed from long lapse of time and other circumstances. *Desverges v. Desverges*, 31 Ga. 753; *Maverick v. Austin*, 1 Bailey (S. C.) 59.



one long in possession of land proves a right to the beneficial enjoyment of the property. A formal conveyance to him from the titular owner may oftentimes be presumed.<sup>795</sup> Thus, in all cases where trustees ought to have conveyed to the beneficial owner, it may be presumed that they have conveyed accordingly.<sup>796</sup> So, the presumption may be indulged in regard to deeds of partition<sup>797</sup> and conveyances from vendor to purchaser.<sup>798</sup> It does not arise, however, unless the possessor shows a title which is good in substance, though wanting in some collateral matter necessary to make it complete in point of form;<sup>799</sup> and the possession must have been consistent with the nature of the conveyance which the possessor claims.<sup>800</sup>

<sup>795</sup> Doe d. Burdett v. Wrighte, 2 Barn. & Ald. 710; Emery v. Grocock, Madd. & Gel. 54; Cooke v. Soltan, 2 Sim. & S. 154; Normant v. Eureka Co., 98 Ala. 181, 39 A. S. R. 45; Vandyck v. Van Beuren, 1 Caines (N. Y.) 84; Emans v. Turnbull, 2 Johns. (N. Y.) 313, 3 A. D. 427.

<sup>796</sup> Doe d. Bowerman v. Sybourn, 7 Term R. 2; England v. Slade, 4 Term R. 682; Hillary v. Waller, 12 Ves. 239; Doggett v. Hart, 5 Fla. 215, 58 A. D. 464; Matthews v. Ward, 10 Gill & J. (Md.) 443, 455 (semble); Moore v. Jackson, 4 Wend. (N. Y.) 58; Jackson v. Cole, 4 Cow. (N. Y.) 587; Jackson v. Moore, 13 Johns. (N. Y.) 513, 7 A. D. 398; McCullough v. Wall, 4 Rich. Law (S. C.) 68, 53 A. D. 715; Howell v. House, 2 Const. (S. C.) 80; Marr's Heirs v. Gilliam, 1 Cold. (Tenn.) 488; Alkin v. Smith, 1 Sneed (Tenn.) 304; Townsend v. Downer's Adm'r, 32 Vt. 183, 200, 205. Presumption of extinguishment of trust, see note 702, supra.

<sup>797</sup> Hepburn v. Auld, 5 Cranch (U. S.) 262; Jackson v. Miller, 6 Wend. (N. Y.) 228, 21 A. D. 316; Jackson v. Woolsey, 11 Johns. (N. Y.) 446. And see Russell's Heirs v. Marks' Heirs, 3 Metc. (Ky.) 37; Munroe v. Gates, 48 Me. 463.

<sup>798</sup> Downing's Heirs v. Ford, 9 Dana (Ky.) 391; Chiles v. Conley's Heirs, 2 Dana (Ky.) 21; Nixon's Heirs v. Carco's Heirs, 28 Miss. 414, 431; Briggs v. Prosser, 14 Wend. (N. Y.) 227; Jackson v. Murray, 7 Johns. (N. Y.) 5; Duke v. Thompson, 16 Ohio, 34; Grimes v. Bastrop, 26 Tex. 310 (semble).

<sup>799</sup> Langley v. Sneyd, 1 Sim. & S. 45; Doe d. Hammond v. Cooke, 6 Bing. 174; Hodsden v. Staple, 2 Term R. 684; Keene v. Deardon, 8

The statutes of limitation have not superseded the presumption of lost grant,<sup>801</sup> and it may arise even though the legal owner's right to recover the property has not been lost by limitation or prescription.<sup>802</sup>

What gives rise to the presumption is long possession in connection with other circumstances. Possession alone does not found a presumption of lost grant unless it has continued for such a length of time and under such circumstances as to give the occupant title by limitation or prescription.<sup>803</sup>

As between individual claimants of lands, the presumption may arise in favor of a grant from the state as well as from an individual.<sup>804</sup>

East, 248; Doggett v. Hart, 5 Fla. 215, 58 A. D. 464; Schaubert v. Jackson, 2 Wend. (N. Y.) 13, 36; Jackson v. Miller, 6 Wend. (N. Y.) 228, 21 A. D. 316; Marr's Heirs v. Gilliam, 1 Cold. (Tenn.) 488; Beach v. Beach, 14 Vt. 28, 39 A. D. 204; Townsend v. Downer's Adm'r, 32 Vt. 183.

<sup>800</sup> Doe d. Hammond v. Cooke, 6 Bing. 174, 179; Nieto's Heirs v. Carpenter, 21 Cal. 455; Colvin v. Warford, 20 Md. 357; Townsend v. Downer's Adm'r, 32 Vt. 183, 193, 201, 208.

<sup>801</sup> Stamford v. Dunbar, 13 Mees. & W. 822; Fletcher v. Fuller, 120 U. S. 534, 550; Ricard v. Williams, 7 Wheat. (U. S.) 59, 110.

<sup>802</sup> Bealey v. Shaw, 6 East, 208, 215; Hanmer v. Chance, 4 De Gex, J. & S. 626; Fletcher v. Fuller, 120 U. S. 534, 550; Ricard v. Williams, 7 Wheat. (U. S.) 59, 110; Clark v. Faunce, 4 Pick. (Mass.) 245; Marr's Heirs v. Gilliam, 1 Cold. (Tenn.) 488; Townsend v. Downer's Adm'r, 32 Vt. 183. See, however, Day v. Williams, 2 Crompt. & J. 460.

<sup>803</sup> Eldridge v. Knott, Cowp. 214; Hanmer v. Chance, 4 De Gex, J. & S. 626; Sumner v. Child, 2 Conn. 607; Bunce v. Wolcott, 2 Conn. 27, 31; Lloyd v. Gordon, 2 Har. & McH. (Md.) 254; Clark v. Faunce, 4 Pick. (Mass.) 245; Townsend v. Downer's Adm'r, 32 Vt. 183.

It has been held, however, that in cases not within the statute of limitations, grants may be presumed from mere length of possession, unaccompanied by auxiliary circumstances. Townsend v. Downer's Adm'r, 32 Vt. 183.

<sup>804</sup> Lopez v. Andrew, 3 Man. & R. 329, note; Roe d. Johnson v. Ireland, 11 East, 280; Jarboe v. McAtee's Heirs, 7 B. Mon. (Ky.) 279, 280; Crooker v. Pendleton, 23 Me. 339; Jackson v. McCall, 10 Johns. (N.

(b) **Nature of presumption.** The presumption is one of fact, not one of law. It is therefore not binding on the jury, but is merely a permissible inference which they may draw or reject, as to them seems reasonable and proper, and it is, of course, rebuttable.<sup>805</sup> It has been said, however, that while the evidence must show that a conveyance as claimed was legally possible,<sup>806</sup> yet that it is not necessary for the jury to believe that a conveyance was in point of fact executed, and that it is sufficient if the evidence leads to the conclusion that the conveyance might have been executed.<sup>807</sup>

Y.) 377, 6 A. D. 343; *Mather v. Trinity Church*, 3 Serg. & R. (Pa.) 509, 8 A. D. 663; *Grimes v. Bastrop Corp.*, 26 Tex. 310. See, however, *Oaksmith's Lessee v. Johnston*, 92 U. S. 343.

<sup>805</sup> *Doe d. Fenwick v. Reed*, 5 Barn. & Ald. 232; *Livett v. Wilson*, 3 Bing. 115; *Tenny v. Jones*, 3 Moore & S. 472, 484; *Lincoln v. French*, 105 U. S. 614; *Ricard v. Williams*, 7 Wheat. (U. S.) 59, 110; *Hurst's Lessee v. McNeil*, 1 Wash. C. C. 70, Fed. Cas. No. 6,936; *Bunce v. Wolcott*, 2 Conn. 27, 31; *Chiles v. Conley's Heirs*, 2 Dana (Ky.) 21; *Grimes v. Bastrop Corp.*, 26 Tex. 310, 314; *Townsend v. Downer's Adm'r*, 32 Vt. 183. *Contra*, *Hillary v. Waller*, 12 Ves. 239. Accordingly, a lost grant will not be presumed where the origin of the claimant's right is, in fact, known, and negatives a grant as claimed. *Attorney-General v. Ewelme Hospital*, 17 Beav. 366; *Nieto's Heirs v. Carpenter*, 21 Cal. 455; *Colvin v. Warford*, 20 Md. 357, 396 (semble); *Clafin v. Boston & A. R. Co.*, 157 Mass. 489; *Attorney General v. Revere Copper Co.*, 152 Mass. 444, 9 L. R. A. 510.

In some cases the presumption seems to be regarded as a rebuttable presumption of law, which the jury are obliged to indulge, in the absence of evidence to the contrary. *Fletcher v. Fuller*, 120 U. S. 534, 550.

<sup>806</sup> *Williams v. Donell*, 2 Head [Tenn.] 694.

A grant may not be presumed where it would have been unlawful or beyond the power of the alleged grantor. *Bunce v. Wolcott*, 2 Conn. 27, 31 (semble); *Hunt v. Hunt*, 3 Metc. (Mass.) 175, 37 A. D. 130, 133; *Watkins v. Peck*, 13 N. H. 360, 40 A. D. 156; *Donahue v. State*, 112 N. Y. 142; *Doe d. Jackson v. Hillsborough Com'rs*, 18 N. C. (1 Dev. & B.) 177; *University of Vt. v. Reynold's Ex'r*, 3 Vt. 542, 23 A. D. 234, 244.

<sup>807</sup> *Fletcher v. Fuller*, 120 U. S. 534, 547; *Dunn v. Eaton*, 92 Tenn. 743.

**§ 91. Presumption of lost grant arising from adverse user or possession—Prescription.**

(a) **Preliminary considerations.** We have seen that, in the absence of other evidence of title, possession of real estate gives rise to a presumption of ownership in the occupant,<sup>808</sup> but that, where the legal title appears to be outstanding, the occupant must adduce other evidence of title than that arising from his possession. We have seen also that this evidence may consist of possession coupled with other circumstances justifying an inference of a conveyance by the legal owner or some one of his predecessors to the occupant or some one under whom he claims; but that possession alone will not justify a presumption of lost grant unless it has continued long enough to give title by limitations or prescription.<sup>809</sup> With title by limitations we are not concerned, since it is only occasionally spoken of as founded on a presumption of lost grant, and is generally regarded in its true light, namely, as a title based on a rule of law whereby adverse possession for the statutory period divests the legal owner of his title and vests it absolutely in the occupant. The present discussion is concerned with prescription, or the so-called presumption of lost grant arising from adverse possession or user in those cases where, for one reason or another, the statutes of limitation do not apply.

At the outset it is necessary clearly to define the distinction between title by adverse possession and title by prescription. To quote from a late work on the subject: "There were, even in early times, numerous statutes adopted in England limiting the time within which an action could be brought on account of a disseisin of land, but these differed from the stat-

<sup>808</sup> See § 89(b), *supra*.

<sup>809</sup> See § 90(a), *supra*.

utes of the present day in that, instead of naming a certain number of years before the institution of the action beyond which no disseisin could be alleged, they named a certain year back of which the pleader could not go. The last statute which adopted this method of fixing the period of limitation was St. Westminster I. c. 39 [3 Edw. I., A. D. 1275], which forbade the seisin of an ancestor to be alleged in a writ of right prior to the beginning of the reign of Richard I. [A. D. 1189], and for other writs fixed the year 1217. Thus, under this statute, at the time of its passage, the period of limitation for some writs was fifty-eight years, and this period was lengthened, as time went on without any change in the law, so that it exceeded three hundred years, when, by 32 Hen. VIII. c. 2 [A. D. 1540], a change was made, and the modern method was adopted of fixing a certain number of years within which the action must be brought. This last statute, however, applied only to the old real actions, and, the action of ejectment having to a great extent taken their place, St. 21 Jac. I. c. 16 [A. D. 1623], was passed, which provided that no person should thereafter make any entry into lands, tenements, or hereditaments but within twenty years next after his or their right or title shall have accrued. This statute, while not in terms applying to the action of ejectment, did so in effect by barring the right of entry on which the action depended. This statute of James I. is that on which the statutes in this country are more or less modeled. It has been superseded in England by later statutes, which tend to bar an action to recover land after the statutory period has elapsed without reference to the character of the possession of the defendant in the action. In that country the problem is much simplified, however, by the absence of wild and unsettled lands. In this country many perplexing and difficult questions have arisen under the statutes as to the character of the possession of the land which

one must have for the statutory period in order that the rights of the original owner may be barred. A possession for the statutory period which is sufficient to bar an action to recover the land is known as 'adverse possession,' and one who thus acquires rights in the land as against the former owner is said to acquire title by 'adverse possession.'<sup>810</sup>

"Though the statute of Westminster I., establishing a date back of which the pleader could not go, applied to actions for the recovery of the land only, and not to those for the recovery of incorporeal things, 'the judges, with that assumption of legislative authority which has at times characterized our judicature, proceeded to apply the rule as to prescription established by the statute to incorporeal hereditaments, and, among others, to easements.' Subsequently, when, by the statutes of 32 Hen. VIII. c. 2, and 21 Jac. I. c. 16, the time for bringing a writ of right or a possessory action to recover land was reduced to sixty and twenty years, respectively, it might have been expected that the judges would, as in the case of the earlier act, apply the analogy of these acts to incorporeal things. This, however, it seems, they did not do, but they effected the same end by the adoption of the fiction that a grant of the right would be presumed if it had been exercised for a period of twenty years; this doctrine of a lost grant being in reality prescription, under another name, shortened in analogy to the period of limitation fixed by the statute of James.'<sup>811</sup>

(b) **Presumption and its extent.** If a person exercises adversely any proprietary right in another's land for a period necessary to give title to the land itself by limitations, a presumption is said to arise that the right was created by a prop-

<sup>810</sup> Tiffany, Real Prop. § 436.

<sup>811</sup> Tiffany, Real Prop. § 445.

er instrument which has been lost, and the title so acquired is termed a title by prescription.<sup>812</sup> The presumption is inde-

<sup>812</sup> *Franchise.* *Jenkins v. Harvey*, 1 Crompt., M. & R. 877. Corporate franchises, see § 28(a), *supra*.

*Right to lateral support.* *Dalton v. Angus*, 6 App. Cas. 740.

*Mining rights.* *Arnold v. Stevens*, 24 Pick. (Mass.) 106, 35 A. D. 305.

*Pew rights.* *Brattle Square Church v. Bullard*, 2 Metc. (Mass.) 363.

*Right of way.* *Jesse French P. & O. Co. v. Forbes*, 129 Ala. 471, 87 A. S. R. 71; *Hill v. Crosby*, 2 Pick. (Mass.) 466, 13 A. D. 448; *Lanier v. Booth*, 50 Miss. 410; *Cholla-Potosi Min. Co. v. Kennedy*, 3 Nev. 361, 93 A. D. 409; *Smith v. Putnam*, 62 N. H. 369; *Corning v. Gould*, 16 Wend. (N. Y.) 531; *Nicholls v. Wentworth*, 100 N. Y. 455; *Reimer v. Stuber*, 20 Pa. 458, 59 A. D. 744.

*Water rights.* *Magor v. Chadwick*, 11 Adol. & E. 571; *Bealey v. Shaw*, 6 East, 208, 215; *Wright v. Howard*, 1 Sim. & S. 190; *Balston v. Bensted*, 1 Camp. 463; *Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Legg v. Horn*, 45 Conn. 409; *Ingraham v. Hutchinson*, 2 Conn. 584; *Wallace v. Fletcher*, 30 N. H. 434; *Watkins v. Peck*, 13 N. H. 360, 40 A. D. 156; *Bullen v. Runnels*, 2 N. H. 255, 9 A. D. 55; *Campbell v. Smith*, 8 N. J. Law, 140, 14 A. D. 400; *Or. Const. Co. v. Allen Ditch Co.*, 41 Or. 209, 93 A. S. R. 701; *Mitchell v. Walker*, 2 Alk. (Vt.) 266, 16 A. D. 710; *Blaine v. Ray*, 61 Vt. 566. And see *Strickler v. Todd*, 10 Serg. & R. (Pa.) 63, 13 A. D. 649.

*Right to flood lands.* *Wright v. Moore*, 38 Ala. 593, 82 A. D. 731; *Shahan v. Ala. G. S. R. Co.*, 115 Ala. 181, 67 A. S. R. 20; *Totel v. Bonnefoy*, 123 Ill. 653, 5 A. S. R. 570; *Gregory v. Bush*, 64 Mich. 37, 8 A. S. R. 797; *Swan v. Munch*, 65 Minn. 500, 60 A. S. R. 491; *Mueller v. Fruen*, 36 Minn. 273; *Alcorn v. Sadler*, 71 Miss. 634, 42 A. S. R. 484; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Hall v. Augsburg*, 46 N. Y. 622; *Mills v. Hall*, 9 Wend. (N. Y.) 315, 24 A. D. 160; *Emery v. Raleigh & G. R. Co.*, 102 N. C. 209, 11 A. S. R. 727; *R. Co. v. Mossman*, 90 Tenn. 157, 25 A. S. R. 670; *Charnley v. Shawano W. P. & R. I. Co.*, 109 Wis. 563, 53 L. R. A. 895; *Rooker v. Perkins*, 14 Wis. 79.

*Drainage rights.* *White v. Chapin*, 12 Allen (Mass.) 516; *Pitsman v. Boyce*, 111 Mo. 387, 33 A. S. R. 536; *Earl v. De Hart*, 12 N. J. Eq. 280, 72 A. D. 395.

*Fishing rights.* *Melvin v. Whiting*, 10 Pick. (Mass.) 295, 20 A. D. 524; *Cobb v. Davenport*, 32 N. J. Law, 369. And see *Leconfield v. Lonsdale*, L. R. 5 C. P. 657; *Carter v. Tinicum Fish. Co.*, 77 Pa. 310.

*Ferry rights.* *Smith v. Harkins*, 38 N. C. (3 Ired. Eq.) 613, 44 A. D. 83; *Bird v. Smith*, 8 Watts (Pa.) 434, 34 A. D. 483.

pendent of the statute of limitations, and applies to subjects not within or expressly excluded from the operation of the statute.<sup>818</sup> Provided that the right claimed does not constitute a public nuisance, the presumption may be indulged in favor

*Right to cut ice.* Hoag v. Place, 93 Mich. 450.

*Right to take water from well.* Smith v. Putnam, 62 N. H. 369.

*Wharfage rights.* Nichols v. Boston, 98 Mass. 39, 93 A. D. 132.

A grant upon condition that the grantee shall perform certain acts may be presumed from an adverse user of twenty years, and performance of those acts. Watkins v. Peck, 13 N. H. 360, 40 A. D. 156; Mitchell v. Walker, 2 Aikens (Vt.) 266, 16 A. D. 710. And see London & N. W. R. Co. v. Commissioners, 75 L. T. R. 629. And a grant subject to a reservation may also be presumed. Bolivar Mfg. Co. v. Neponset Mfg. Co., 16 Pick. (Mass.) 241.

The presumption of lost grant may arise, even though the conveyance is such that it should have been recorded, and no record of it can be found. Valentine v. Piper, 22 Pick. (Mass.) 85, 33 A. D. 715; Brattle Square Church v. Bullard, 2 Metc. (Mass.) 363.

The presumption has been held to apply to personal property. McArthur v. Carrie's Adm'r, 32 Ala. 75, 70 A. D. 529.

The rules regarding the establishment of a custom by immemorial usage are analogous to those under consideration. Bryant v. Foot, L. R. 3 Q. B. 497, affirming L. R. 2 Q. B. 161, Thayer, Cas. Ev. 46; Mills v. Colchester, L. R. 2 C. P. 476; London & N. W. R. Co. v. Commissioners, 75 L. T. R. 629; Stamford v. Dunbar, 13 Mees. & W. 822.

"A right to use land for highway purposes may usually be acquired by the public by its use for such purposes under a claim of right for the statutory period of limitation as to land. Such mode of acquisition of highway rights is ordinarily referred to as 'prescription,' and is generally based on the theory that such user of the land raises the presumption of a dedication, or of an appropriation of the land by a statutory proceeding." Tiffany, Real Prop. § 452, citing cases. And see note to Whitesides v. Green, 13 Utah, 341, 57 A. S. R. 740.

<sup>818</sup> Bunce v. Wolcott, 2 Conn. 28, 31; Wadsworthville Poor School v. Jennings, 40 S. C. 168, 42 A. S. R. 854; Knight v. Heaton, 22 Vt. 480. See Doe d. Wallace v. Maxwell, 32 N. C. (10 Ired. Law) 110, 51 A. D. 380.

The statutes of limitation have not superseded the presumption of lost grant arising from immemorial user. Stamford v. Dunbar, 13 Mees. & W. 822 (semble). See page 349, *supra*.



of a lost grant from the state as well as from an individual;<sup>814</sup> and it may operate against a corporation as well as against an individual owner.<sup>815</sup>

(c) **Nature of presumption.** In some cases this presumption has been deemed one of fact which the jury may or may not indulge, according to whether the probability of a grant in fact is established by the evidence.<sup>816</sup> By the great weight of au-

<sup>814</sup> *Attorney-General v. Revere Copper Co.*, 152 Mass. 444, 9 L. R. A. 510 (statute); *Nichols v. Boston*, 98 Mass. 39, 93 A. D. 132 (statute); *Knight v. Heaton*, 22 Vt. 480.

The exclusive right to navigate a public river cannot be acquired by prescription. *Bird v. Smith*, 8 Watts (Pa.) 434, 34 A. D. 483 (semble). Neither can the right to obstruct a street. *Kelly v. Pittsburgh, C., C. & St. L. R. Co.*, 28 Ind. App. 457, 91 A. S. R. 134; *Com. v. Moorehead*, 118 Pa. 344, 4 A. S. R. 599. Nor the exclusive right to operate a stage line over a highway. *Eastman v. Curtis*, 1 Conn. 323.

"While it is well recognized that no rights can be acquired by prescription to maintain a public nuisance, the cases are not in accord on the question whether one's right to set up a prescriptive right of user, as against the private owner of land, is defeated by the fact that such user constitutes, in itself, a public nuisance." *Tiffany*, *Real Prop.* § 445, citing cases.

<sup>815</sup> *Northern Pac. R. Co. v. Townsend*, 84 Minn. 152, 87 A. S. R. 342; *Wadsworthville Poor School v. Jennings*, 40 S. C. 168, 42 A. S. R. 854, 869.

In North Carolina, however, lands or easements acquired by a railroad, plank road, turnpike, or canal company by condemnation cannot be lost by prescription. *Bass v. Roanoke N. & W. P. Co.*, 111 N. C. 439, 19 L. R. A. 247.

<sup>816</sup> *Livett v. Wilson*, 3 Bing. 115, 118 (semble); *Trotter v. Harris*, 2 Younge & J. 285 (semble); *Little v. Wingfield*, 11 Ir. C. L. 63; *Mitchell v. Walker*, 2 Ark. (Vt.) 266, 16 A. D. 710 (semble). *Contra*, *McArthur v. Carrie's Adm'r*, 32 Ala. 75, 70 A. D. 529.

In *Parker v. Foote*, 19 Wend. (N. Y.) 309, the court says, first (page 314), that the presumption arising from twenty years' adverse possession is not a presumption of fact, but "a presumption of mere law." Yet the court says (page 316) that, even in the absence of evidence in rebuttal, the question is one for the jury, thus denying the presumption the effect due to a presumption of law, and giving

thority, however, it is a presumption of law,—a conclusive presumption, so called. It is sometimes said that the presumption is not conclusive, but rebuttable.<sup>817</sup> Most of the cases in which this proposition is advanced will be found to be those in which the rebutting evidence, so called, tends to disprove facts on which the presumption is based, and necessarily assumed by the presumption to exist,—such as the continuity of the possession, its hostility, its notoriety, etc.<sup>818</sup> Evidence to disprove the foundation of the presumption is unquestionably admissible, but it does not follow that the presumption itself is rebuttable.<sup>818a</sup> Properly speaking, the presumption does not arise until the facts on which it is founded are established by evidence. When these facts have been proved, and not until then, the presumption comes into existence. And when it has thus been created, evidence is not admissible to show that in fact a grant was never made, since the presumption, like the statutes of limitation, is based on a principle of public policy having for its object the quieting of titles. The presumption is therefore conclusive, or, to speak properly, it is a rule of substantive law that the adverse user of a proprietary right for the prescribed period divests the true owner's title, and vests it absolutely in the adverse claimant.<sup>819</sup>

it the force of a presumption of fact only. Again the court says (page 315) that the presumption is rebuttable. Yet it is questioned (page 319) whether proof that no grant was in fact made would overcome the presumption, thus implying (without deciding, however) that the presumption is a so-called conclusive presumption. This case affords a fair specimen of the difficulties met with in the law of presumptions.

<sup>817</sup> *Lanier v. Booth*, 50 Miss. 410; *Parker v. Foote*, 19 Wend. (N. Y.) 309.

<sup>818</sup> *McArthur v. Carrie's Adm'r*, 32 Ala. 75, 70 A. D. 529; *Nieto's Heirs v. Carpenter*, 21 Cal. 455, 489; *Wadsworthville Poor School v. Jennings*, 40 S. C. 168, 42 A. S. R. 854, 866, 867; *Field v. Brown*, 24 Grat. (Va.) 74. And see *English v. Register*, 7 Ga. 387.

<sup>818a</sup> See page 52, *supra*.

<sup>819</sup> *Tiffany*, Real Prop. § 445; *Wright v. Howard*, 1 Sim. & S. 190, 202.

(d) **Sufficiency of user or possession.** Since the presumption of lost grant is founded by analogy upon the statutes of limitation, it is generally held that the user or possession which will give rise to the presumption must, so far as the nature of the property permits, satisfy the conditions of adverse possession as it is defined under those statutes.<sup>820</sup> The burden of proving all the essential elements of adverse user or possession rests on the adverse claimant,<sup>821</sup> and it must be proved by clear and strong evidence.<sup>822</sup>

In the absence of statute, the full period of twenty years must have elapsed, else a grant will not be presumed from adverse user of the right in question.<sup>823</sup> It is to be remembered,

*Tyler v. Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Casey's Lessee v. Inloes*, 1 Gill (Md.) 430, 39 A. D. 658; *Coolidge v. Learned*, 8 Pick. (Mass.) 504, 508; *Wallace v. Fletcher*, 30 N. H. 434, 447; *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. Law, 605; *Ward v. Warren*, 82 N. Y. 265; *Okeson v. Patterson*, 29 Pa. 22; *Lamb v. Crosland*, 4 Rich. Law (S. C.) 536; *Wadsworthville Poor School v. Jennings*, 40 S. C. 168, 42 A. S. R. 854, 865, 866 (semble); *University of Vt. v. Reynold's Ex'r*, 3 Vt. 542, 23 A. D. 234, 242 (semble); *Tracy v. Atherton*, 36 Vt. 503.

<sup>820</sup> *Pitzman v. Boyce*, 111 Mo. 387, 33 A. S. R. 536, 538; *Mission v. Cronin*, 143 N. Y. 524; *Or. Const. Co. v. Allen Ditch Co.*, 41 Or. 209, 93 A. S. R. 701; *North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.*, 16 Utah, 246, 67 A. S. R. 607. These conditions are well put in short form in *Tiffany, Real. Prop.* §§ 436-444.

<sup>821</sup> *Carlisle v. Cooper*, 19 N. J. Eq. 256. And see *De Frieze v. Quint*, 94 Cal. 653, 28 A. S. R. 151; *Rowland v. Updike*, 28 N. J. Law, 101; *Lecomte v. Toudouze*, 82 Tex. 208, 27 A. S. R. 870; *Fuller v. Worth*, 91 Wis. 406.

<sup>822</sup> *Budd v. Brooke*, 3 Gill (Md.) 198, 43 A. D. 321; *Casey's Lessee v. Inloes*, 1 Gill (Md.) 430, 39 A. D. 658. And see *Rowland v. Updike*, 28 N. J. Law, 101.

A prescriptive right to render water unfit for domestic purposes requires the strictest proof. *McCallum v. Germantown Water Co.*, 54 Pa. 40, 93 A. D. 656.

<sup>823</sup> *Johnson v. Jordan*, 2 Metc. (Mass.) 234, 37 A. D. 85; *Campbell v. Smith*, 8 N. J. Law, 140, 14 A. D. 400.

Successive adverse user, for more than twenty years, of two ease-

however, that the time is usually fixed by analogy with reference to the time allowed by statute within which an action may be brought to recover possession of land.<sup>824</sup> Consequently, if the statutory time is either more or less than twenty years, the prescriptive period varies accordingly.<sup>825</sup> For the purpose of making up the twenty years' period necessary to found the presumption of a lost grant, successive adverse users may be tacked together,<sup>826</sup> if the several possessors stand in

ments of like character and in same locality, does not found a presumption of grant if neither was enjoyed for a period of twenty years. *Total v. Bonnefoy*, 123 Ill. 653, 5 A. S. R. 570.

The prescriptive period commences to run, not necessarily when the user first commences, but when the injury resulting from that user commences. *Eells v. Chesapeake & O. R. Co.*, 49 W. Va. 65, 87 A. S. R. 787.

<sup>824</sup> *Jesse French P. & O. Co. v. Forbes*, 129 Ala. 471, 87 A. S. R. 71; *Bunce v. Wolcott*, 2 Conn. 27, 31; *Coolidge v. Learned*, 8 Pick. (Mass.) 504, 508; *Nichols v. Boston*, 98 Mass. 39, 93 A. D. 132; *Edson v. Munsell*, 10 Allen (Mass.) 557, 566; *Mueller v. Fruen*, 36 Minn. 273; *Lanier v. Booth*, 50 Miss. 410; *Pitzman v. Boyce*, 111 Mo. 387, 33 A. S. R. 536; *Wallace v. Fletcher*, 30 N. H. 434, 447; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Cobb v. Davenport*, 32 N. J. Law, 369; *Corning v. Gould*, 16 Wend. (N. Y.) 531; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Or. Const. Co. v. Allen Ditch Co.*, 41 Or. 209, 216, 93 A. S. R. 701, 707; *Worrall v. Rhoads*, 2 Whart. (Pa.) 427, 30 A. D. 274; *McGeorge v. Hoffman*, 133 Pa. 381; *Rooker v. Perkins*, 14 Wis. 79. See, however, *Wadsworthville Poor School v. Jennings*, 40 S. C. 168, 42 A. S. R. 854, 867.

The time is prescribed by statute expressly in some states. *Conner v. Woodfill*, 126 Ind. 85, 22 A. S. R. 568; *Delahoussaye v. Judice*, 13 La. Ann. 587, 71 A. D. 521.

<sup>825</sup> *Wright v. Moore*, 38 Ala. 593, 82 A. D. 731; *Shahan v. Ala. G. S. R. Co.*, 115 Ala. 181, 67 A. S. R. 20; *Legg v. Horn*, 45 Conn. 409; *Ingraham v. Hutchinson*, 2 Conn. 584; *Melvin v. Whiting*, 10 Pick. (Mass.) 295, 20 A. D. 524; *Hoag v. Place*, 93 Mich. 450; *Alcorn v. Sadler*, 71 Miss. 634, 42 A. S. R. 484; *Chollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 361, 93 A. D. 409; *Reimer v. Stuber*, 20 Pa. 458, 59 A. D. 744; *Krier's Private Road*, 73 Pa. 109; *Mitchell v. Walker*, 2 Alk. (Vt.) 266, 16 A. D. 710. See *Wallace v. Maxwell*, 32 N. C. (10 Ired.) 110, 51 A. D. 380.

<sup>826</sup> *Tiffany*, Real Prop. § 446; *Bradley's Fish Co. v. Dudley*, 37 Conn. 136; *Ross v. Thompson*, 78 Ind. 90; *Leonard v. Leonard*, 7 Allen

privity<sup>827</sup> and their possession is continuous.<sup>828</sup> The various statutes of limitation adopted throughout the United States generally extend the time for bringing an action to recover land if the plaintiff was under disability on account of infancy, insanity, coverture, or otherwise unable to sue when the right of action accrued; and these exceptions are applied by analogy, in cases of prescription, where a lost grant would otherwise be presumed.<sup>829</sup>

(Mass.) 277; *Dodge v. Stacy*, 39 Vt. 558. However, the time of the use of a drainage ditch cannot be tacked to the time of the use of an older ditch employed in the same locality for the same purpose. *Total v. Bonnefoy*, 123 Ill. 653, 5 A. S. R. 570.

<sup>827</sup> *Tiffany*, Real Prop. § 446; *Holland v. Long*, 7 Gray (Mass.) 486; *McCullough v. Wall*, 4 Rich. Law (S. C.) 68, 53 A. D. 715.

<sup>828</sup> *Casey's Lessee v. Inloes*, 1 Gill (Md.) 430, 39 A. D. 658. Necessity of continuity of possession, see page 361, *infra*.

<sup>829</sup> *Tiffany*, Real Prop. §§ 439, 447; *Melvin v. Whiting*, 13 Pick. (Mass.) 185, 188 (semble); *Edson v. Munsell*, 10 Allen (Mass.) 557; *Reimer v. Stuber*, 20 Pa. 458, 59 A. D. 744.

The presumption may arise against remaindermen and reversioners during the continuance of the particular estate if they might have brought suit against the adverse claimant at any time within the prescriptive period. *Tiffany*, Real Prop. § 450; *Cross v. Lewis*, 2 Barn. & C. 686; *Ward v. Warren*, 82 N. Y. 265; *Reimer v. Stuber*, 20 Pa. 458, 59 A. D. 744. But the rule is otherwise if they were not in a position to sue. *Pierre v. Fernald*, 26 Me. 436, 46 A. D. 573; *McCorry v. King's Heirs*, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165; *Pentland v. Keep*, 41 Wis. 490. See *Bright v. Walker*, 1 Cr., M. & R. 211, 4 Tyrwh. 502; *Albert Lea v. Nielsen*, 83 Minn. 101, 81 A. S. R. 242.

The disability must have existed at the time the cause of action arose. Subsequent incapacity to sue does not stop the running of time. *Ballard v. Demmon*, 156 Mass. 449; *Mebane v. Patrick*, 46 N. C. (1 Jones, Law) 23, 26; *Tracy v. Atherton*, 36 Vt. 503. *Contra*, *Lamb v. Crosland*, 4 Rich. Law (S. C.) 536. In New Hampshire, it seems, the presumption does not arise if the disability existed at the close of the period of prescription, even though it did not exist at the commencement of that period. *Watkins v. Peck*, 13 N. H. 360, 40 A. D. 156. But a disability which did not exist either at the beginning or at the close of the prescriptive period does not defeat the presumption. *Wallace v. Fletcher*, 30 N. H. 434.

A lost grant is not presumed unless the adverse user has been continuous throughout the statutory period.<sup>830</sup> If, therefore, the owner of the land successfully interrupts, for an appreciable time, the exercise of the user, the time which has theretofore run in favor of the possessor is lost, and a prescriptive right does not come into being until the expiration of the statutory period from the time when the interruption ceased.<sup>831</sup> The requirement of continuity does not demand a constant ex-

One disability cannot be tacked to another, so as to extend the day when the time shall commence to run. *Reimer v. Stuber*, 20 Pa. 458, 59 A. D. 744.

<sup>830</sup> *Tiffany*, Real Prop. § 448; *Jesse French P. & O. Co. v. Forbes*, 129 Ala. 471, 87 A. S. R. 71; *Peters v. Little*, 95 Ga. 151; *Cleveland, C., C. & St. L. R. Co. v. Huddleston*, 21 Ind. App. 621, 69 A. S. R. 385; *Casey's Lessee v. Inloes*, 1 Gill (Md.) 430, 39 A. D. 658; *Armstrong v. Risteau*, 5 Md. 256, 59 A. D. 115; *Bodfish v. Bodfish*, 105 Mass. 317; *Chapel v. Smith*, 80 Mich. 100; *Lanier v. Booth*, 50 Miss. 410; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Nicholls v. Wentworth*, 100 N. Y. 455; *Watt v. Trapp*, 2 Rich. Law (S. C.) 136; *Wadsworthville Poor School v. Jennings*, 40 S. C. 168, 42 A. S. R. 854.

Slight or occasional variations in the exercise of the right do not defeat the continuity of the possession, however. *Fletcher v. Fuller*, 120 U. S. 534, 552 (semble); *Wright v. Moore*, 38 Ala. 593, 82 A. D. 731, 734.

<sup>831</sup> *Sears v. Hayt*, 37 Conn. 406; *Delahoussaye v. Judice*, 13 La. Ann. 587, 71 A. D. 521; *Barker v. Clark*, 4 N. H. 380, 17 A. D. 428; *Plimpton v. Converse*, 42 Vt. 712.

The interruption, to defeat the continuity, must be complete for the time being. *Connor v. Sullivan*, 40 Conn. 26; *McKenzie v. Elliott*, 134 Ill. 156; *Webster v. Lowell*, 142 Mass. 324.

"The fact that the owner of the land, during the statutory period, protests or remonstrates against the exercise of the asserted right, without taking any positive action to prevent its exercise which might be made the ground of a legal action by a person entitled to the right, does not, by the weight of authority, as well as of reason, prevent the acquisition of the right." *Tiffany*, Real Prop. § 448, citing cases.

To defeat the presumption of grant, the interruption by the legal owner must have occurred before the expiration of the twenty years' period. *Carlisle v. Cooper*, 19 N. J. Eq. 256. And see *Welcome v. Upton*, 6 Mees. & W. 536.

ercise of the right, however, where the nature of the right is not such that it cannot be enjoyed without a constant user.<sup>832</sup> If, before the statutory period is completed, a period intervenes during which the dominant and the servient estates are owned by the same person, howsoever short the duration of such ownership, the continuity of the adverse user is broken, and the time which has theretofore run is not available to found the presumption of lost grant.<sup>833</sup>

Generally speaking, the exercise of the right must be exclusive.<sup>834</sup> If, however, a right is by nature susceptible of enjoyment by more than one person during the same period of time,—such, for instance, as a right of way,—it is not necessary, in order to found a presumption of lost grant, that the right should be exercised or claimed by one person exclusively. The fact that others also assert and exercise a like right with reference to the same land does not affect the claimant in question, if he asserts a private right in himself and exercises it without interruption.<sup>835</sup> But if the particular

<sup>832</sup> *Tiffany*, Real Prop. § 448; *Hesperia L. & W. Co. v. Rogers*, 83 Cal. 10, 17 A. S. R. 209; *Cox v. Forrest*, 60 Md. 74; *Bodfish v. Bodfish*, 105 Mass. 317; *Cornwell Mfg. Co. v. Swift*, 89 Mich. 503; *Swan v. Munch*, 65 Minn. 500, 60 A. S. R. 491; *Alcorn v. Sadler*, 71 Miss. 634, 42 A. S. R. 484; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *Gerenger v. Summers*, 24 N. C. (2 Ired.) 229; *Messinger's Appeal*, 109 Pa. 290; *Bird v. Smith*, 8 Watts (Pa.) 434, 34 A. D. 483.

<sup>833</sup> *Tiffany*, Real Prop. § 448; *Pierre v. Fernald*, 26 Me. 436, 46 A. D. 573; *White v. Chapin*, 12 Allen (Mass.) 516, 518; *Vossen v. Dautel*, 116 Mo. 379; *Stuyvesant v. Woodruff*, 21 N. J. Law, 133, 47 A. D. 156.

<sup>834</sup> *Jesse French P. & O. Co. v. Forbes*, 129 Ala. 471, 87 A. S. R. 71. And see *Hunt v. Hunt*, 3 Metc. (Mass.) 175, 37 A. D. 130, 133; *Armstrong v. Risteau's Lessee*, 5 Md. 256, 59 A. D. 115.

<sup>835</sup> *Tiffany*, Real Prop. § 449; *McKenzie v. Elliott*, 134 Ill. 156; *Cox v. Forrest*, 60 Md. 74; *Kilburn v. Adams*, 7 Metc. (Mass.) 33, 39 A. D. 754; *Webster v. Lowell*, 142 Mass. 324; *Ballard v. Demmon*, 156 Mass. 449; *Oregon Const. Co. v. Allen Ditch Co.*, 41 Or. 209, 93 A. S. R. 701; *Wanger v. Hipple* (Pa.) 13 Atl. 81.

claimant exercises the right in common with the public at large, and asserts no private right to do so, his user cannot ripen into a private easement.<sup>886</sup>

The extent of the easement acquired by prescription is restricted to the extent of the adverse user.<sup>887</sup>

To create a presumption of lost grant, the exercise of the right must be hostile or adverse to the owner of the land. If the right is exercised pursuant to his permission, express or implied, it cannot ripen into an easement;<sup>888</sup> and the user, to

<sup>886</sup> *Tiffany*, Real Prop. § 449; *Kilburn v. Adams*, 7 Metc. 33, 39 Am. Dec. 754; *Burnham v. McQuesten*, 48 N. H. 446; *Cobb v. Davenport*, 32 N. J. Law, 369; *Prince v. Wilbourn*, 1 Rich. Law (S. C.) 58; *Plimpton v. Converse*, 44 Vt. 158.

<sup>887</sup> *Wright v. Moore*, 38 Ala. 593, 82 A. D. 731; *Carlisle v. Cooper*, 19 N. J. Eq. 256; *Hall v. Augsbury*, 46 N. Y. 622; *Darlington v. Painter*, 7 Pa. 473; *McGeorge v. Hoffman*, 133 Pa. 381. However, if a man claims, for the prescriptive period, the right to cut ice from any part of a pond, and accordingly cuts it from various parts, though not from the entire pond, his prescriptive right is not limited to the parts from which he has cut ice. *Hoag v. Place*, 93 Mich. 450.

<sup>888</sup> ALABAMA: *Jesse French P. & O. Co. v. Forbes*, 129 Ala. 471, 87 A. S. R. 71.

CALIFORNIA: *Nieto's Heirs v. Carpenter*, 21 Cal. 455; *Thomas v. England*, 71 Cal. 456.

ILLINOIS: *Dexter v. Tree*, 117 Ill. 532.

INDIANA: *Cleveland, C., C. & St. L. R. Co. v. Huddleston*, 21 Ind. App. 621, 69 A. S. R. 385; *Conner v. Woodfill*, 126 Ind. 85, 22 A. S. R. 568.

KENTUCKY: *Conyers v. Scott*, 94 Ky. 123; *Hall v. McLeod*, 2 Metc. 98, 74 A. D. 400.

MAINE: *Bethum v. Turner*, 1 Greenl. 111, 10 A. D. 36; *Morse v. Williams*, 62 Me. 445.

MARYLAND: *Armstrong v. Risteau*, 5 Md. 256, 59 A. D. 115.

MASSACHUSETTS: *Arnold v. Stevens*, 24 Pick. 106, 35 A. D. 305; *Kilburn v. Adams*, 7 Metc. 33, 39 A. D. 754.

MISSISSIPPI: *Lanier v. Booth*, 50 Miss. 410.

MISSOURI: *Pitzman v. Boyce*, 111 Mo. 387, 33 A. S. R. 536.

NEW HAMPSHIRE: *Swett v. Cutts*, 50 N. H. 439, 9 A. R. 276.

NEW JERSEY: *Cobb v. Davenport*, 32 N. J. Law, 369.



be hostile, must be such as to infringe the landowner's right of property, so as to give him a right of action against the claimant.<sup>539</sup> It is for this reason, doubtless, that certain ease-

NEW YORK: *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 A. R. 479; *Parker v. Foote*, 19 Wend. 309.

NORTH CAROLINA: *Mebane v. Patrick*, 46 N. C. (1 Jones, Law) 23.

PENNSYLVANIA: *Bennett v. Biddle*, 140 Pa. 396; *Susquehanna County v. Deans*, 33 Pa. 131; *Demuth v. Amweg*, 90 Pa. 181.

SOUTH CAROLINA: *Trustees of Wadsworthville Poor School v. Jennings*, 40 S. C. 168, 42 A. S. R. 854; *McCullough v. Wall*, 4 Rich. Law, 68, 53 A. D. 715.

VERMONT: *Weed v. Keenan*, 60 Vt. 74, 6 A. S. R. 93; *Mitchell v. Walker*, 2 Aikens, 266, 16 A. D. 710.

VIRGINIA: *Field v. Brown*, 24 Grat. 74.

WISCONSIN: *Whaley v. Jarrett*, 69 Wis. 613, 2 A. S. R. 764; *Pentland v. Keep*, 41 Wis. 490.

User of a right of way is *prima facie* adverse where it was exercised openly, notoriously, and continuously, without the owner's consent being asked, and without any manifestation that it was exercised by his permission. *Chollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 361, 93 A. D. 409. And it has been held that any unexplained user or possession is *prima facie* adverse. *Swan v. Munch*, 65 Minn. 500, 60 A. S. R. 491, 494; *Doe d. Jackson v. Hillsborough Com'rs*, 18 N. C. (1 Dev. & B.) 177.

The presumption may arise, even though the owner acquiesced in the adverse possession because of a prevalent opinion, known to and adopted by him, that the title rested in the state. *Casey's Lessee v. Inloes*, 1 Gill (Md.) 430, 39 A. D. 658.

If a right is once acquired by prescription, it is not lost by a subsequent acknowledgment of the titular owner's title. *Weed v. Keenan*, 60 Vt. 74, 6 A. S. R. 93.

<sup>539</sup> *Tiffany*, Real Prop. § 450.

ENGLAND: *Rowbotham v. Wilson*, 6 El. & Bl. 593.

ALABAMA: *Wright v. Moore*, 38 Ala. 593, 82 A. D. 731, 733; *Roundtree v. Brantley*, 34 Ala. 544, 73 A. D. 470.

CALIFORNIA: *Richard v. Hupp*, 37 Pac. 920.

CONNECTICUT: *Whiting v. Gaylord*, 66 Conn. 327, 50 A. S. R. 87.

GEORGIA: *Mitchell v. Rome*, 49 Ga. 19.

MAINE: *Seidensparger v. Spear*, 17 Me. 123, 35 A. D. 234; *Tinkham v. Arnold*, 3 Me. 120.

MARYLAND: *Casey's Lessee v. Inloes*, 1 Gill, 430, 39 A. D. 658.

ments cannot be acquired by prescription. Their nature is such that the owner of the land cannot prevent the exercise of the right, or sue on account of it, and his failure to attempt to do so is therefore no evidence of acquiescence on his part.<sup>840</sup> A user commencing by license of the landowner may afterwards become hostile, with or without a revocation of the license, by a subsequent repudiation of the owner's rights by the licensee;<sup>841</sup> and rights asserted pursuant to a defective grant from the owner of the land are deemed hostile to him.<sup>842</sup>

MASSACHUSETTS: *Pratt v. Lamson*, 2 Allen, 275; *Gilmore v. Driscoll*, 122 Mass. 199, 207.

MICHIGAN: *Turner v. Hart*, 71 Mich. 128, 15 A. S. R. 243.

NEW HAMPSHIRE: *Burnham v. Kempton*, 44 N. H. 78.

NEW JERSEY: *Carlisle v. Cooper*, 19 N. J. Eq. 256.

NORTH CAROLINA: *Emery v. Raleigh & G. R. Co.*, 102 N. C. 210, 11 A. S. R. 727.

OREGON: *Wimer v. Simmons*, 27 Or. 1, 50 A. S. R. 685.

TEXAS: *Klein v. Gehrung*, 25 Tex. Supp. 232.

It has been held otherwise as to the right to use the waters of a running stream. *Ingraham v. Hutchinson*, 2 Conn. 584. *Contra*, *Parker v. Hotchkiss*, 25 Conn. 321.

If the owner's right of property is infringed, the user may be hostile, even though no actual damage is done to the land. *Tiffany*, Real Prop. § 450, citing cases.

<sup>840</sup> *Tiffany*, Real Prop. § 451; *Broadbent v. Ramsbotham*, 11 Exch. 602; *White v. Chapin*, 12 Allen (Mass.) 516, 518.

*Light and air.* *Jesse French P. & O. Co. v. Forbes*, 129 Ala. 471, 87 A. S. R. 71; *Western Granite & M. Co. v. Knickerbocker*, 103 Cal. 111; *Turner v. Thompson*, 58 Ga. 268, 24 A. R. 497; *Guest v. Reynolds*, 68 Ill. 478, 18 A. R. 570; *Stein v. Hauck*, 56 Ind. 65, 26 A. R. 10; *Pierre v. Fernald*, 26 Me. 436, 46 A. D. 573; *Cherry v. Stein*, 11 Md. 1; *Keats v. Hugo*, 115 Mass. 204, 15 A. R. 80; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Napier v. Bulwinkle*, 5 Rich. Law (S. C.) 311.

*Percolation of waters.* *Chasemore v. Richards*, 7 H. L. Cas. 349; *Frazier v. Brown*, 12 Ohio St. 294; *Wheatley v. Baugh*, 25 Pa. 528, 64 A. D. 721. And see *Roath v. Driscoll*, 20 Conn. 533, 52 A. D. 352. *Contra*, *Balston v. Bensted*, 1 Camp. 463.

<sup>841</sup> *Tiffany*, Real Prop. § 450; *Pitzman v. Boyce*, 111 Mo. 387; *Eckerson v. Crippen*, 110 N. Y. 585; *Huston v. Bybee*, 17 Or. 140; *Thoenke v. Fiedler*, 91 Wis. 386.

The possession or user must be open and notorious,<sup>842</sup>—either this or known by the owner to be adverse to his rights.<sup>844</sup> It is often said without qualification that the hostile user of the land must be known to the owner;<sup>845</sup> but if the user is of such a character as to involve a plain assertion of the right to use the land, the claimant's rights in all probability are not affected by the failure of the owner to take notice of the adverse user, owing to his absence from the neighborhood or to other causes.<sup>846</sup>

### § 92. Possession as evidence of crime.

(a) **Nature of presumption.** Personal and exclusive possession of the fruits of a crime recently after its commission is said to give rise to a presumption that the person in possession is the wrongdoer.<sup>847</sup> This so-called presumption is one

<sup>842</sup> *Tiffany*, Real Prop. § 450; *Legg v. Horn*, 45 Conn. 409; *McKenzie v. Elliott*, 134 Ill. 156; *Parish v. Kaspore*, 109 Ind. 586; *Talbott v. Thorn*, 91 Ky. 417; *Jewett v. Hussey*, 70 Me. 433; *Stearns v. Janes*, 12 Allen (Mass.) 582; *Arbuckle v. Ward*, 29 Vt. 43. *Contra*, *Wiseman v. Lucksinger*, 84 N. Y. 31, 38 A. R. 479.

<sup>843</sup> *Lanier v. Booth*, 50 Miss. 410; *Cobb v. Davenport*, 32 N. J. Law, 369; *Trustees of Wadsworthville Poor School v. Jennings*, 40 S. C. 163, 42 A. S. R. 854.

<sup>844</sup> *Jesse French P. & O. Co. v. Forbes*, 129 Ala. 471, 87 A. S. R. 71.

<sup>845</sup> *Daniel v. North*, 11 East, 372; *American Co. v. Bradford*, 27 Cal. 360; *Peterson v. McCullough*, 50 Ind. 35; *Cleveland, C., C. & St. L. R. Co. v. Huddleston*, 21 Ind. App. 621, 69 A. S. R. 385; *Zigefoose v. Zigefoose*, 69 Iowa, 391; *Hannefin v. Blake*, 102 Mass. 297; *Wallace v. Fletcher*, 30 N. H. 434; *Cobb v. Davenport*, 32 N. J. Law, 369; *Parker v. Foote*, 19 Wend. (N. Y.) 309.

<sup>846</sup> *Tiffany*, Real Prop. § 450; *Jesse French P. & O. Co. v. Forbes*, 129 Ala. 471, 87 A. S. R. 71; *Ward v. Warren*, 82 N. Y. 265; *Reimer v. Stuber*, 20 Pa. 458, 59 A. D. 744; *Perrin v. Garfield*, 37 Vt. 304. And see *Carney v. Hennessey*, 74 Conn. 107, 53 L. R. A. 699; *Cook v. Gammon*, 93 Ga. 298.

<sup>847</sup> For early instances of this presumption, see *Thayer*, Prel. Treat. Ev. 327. And see 8 Current Law, 707.

A like presumption arises in civil cases. Thus, in an action of

of fact, not one of law. It does not make a *prima facie* case of guilt, and so shift the burden of adducing evidence upon the shoulders of the accused to such an extent that if he fails to explain his possession the jury must necessarily convict him as a matter of law, regardless of their belief in his innocence. While the fact of possession may be a suspicious circumstance naturally calling for an explanation from the accused, yet in failing to give it he does not subject himself absolutely to a conviction. He merely runs a risk that, without an explanation, the jury may believe him guilty and find accordingly. If the jury do not believe in his guilt, they cannot convict him, even though he fails to explain his possession. The sole effect of the presumption, even in the absence of explanatory evidence, is, therefore, not to require a conviction, but merely to justify it.<sup>848</sup> In some states, however, this

trespass *q. c. f.*, a presumption of guilt arises if it appears that a house, the removal whereof is the cause of action, was subsequently in the possession of the defendant. *Finch's Ex'rs v. Alston*, 2 Stew. & P. (Ala.) 83, 23 A. D. 299.

<sup>848</sup> ALABAMA: *Smith v. State*, 133 Ala. 145, 91 A. S. R. 21.

CONNECTICUT: *State v. Raymond*, 46 Conn. 345.

GEORGIA: *Gravitt v. State*, 114 Ga. 841, 88 A. S. R. 63.

INDIAN TERRITORY: *Oxler v. U. S.*, 1 Ind. T. 85.

IOWA: *State v. Richart*, 57 Iowa, 245.

KANSAS: *State v. Powell*, 61 Kan. 81.

MISSISSIPPI: *Stokes v. State*, 58 Miss. 677.

NEBRASKA: *Robb v. State*, 35 Neb. 285.

NEW HAMPSHIRE: *State v. Hodge*, 50 N. H. 510.

NEW YORK: *Stover v. People*, 56 N. Y. 315.

NORTH CAROLINA: *State v. Rights*, 82 N. C. 675; *State v. McRae*, 120 N. C. 608, 58 A. S. R. 808.

OKLAHOMA: *Johnson v. Ter.*, 5 Okl. 695.

OREGON: *State v. Pomeroy*, 30 Or. 16.

TEXAS: *Boyd v. State*, 24 Tex. App. 570, 5 A. S. R. 908; *Stockman v. State*, 24 Tex. App. 387, 5 A. S. R. 894.

VIRGINIA: *Kibler v. Com.*, 94 Va. 804.

WASHINGTON: *State v. Walters*, 7 Wash. 246.

WISCONSIN: *Ingalls v. State*, 48 Wis. 647.

view does not prevail. The presumption is regarded as one of law, which accordingly makes a *prima facie* case of guilt, and requires the jury to convict in the absence of an explanation.<sup>849</sup> In yet other states it has been held, on the other hand, that recent possession of stolen property does not of itself justify a verdict of guilty. In these jurisdictions, therefore, there arises from recent possession no presumption whatever, either of law or of fact.<sup>850</sup>

(b) **Illustrations.** The presumption most often arises in prosecutions for larceny, where the stolen property is found in the accused's possession recently after the commission of the offense,<sup>851</sup> but its operation is not confined to those cases.

Even though recent possession may justify a conviction, yet in some states the court is not allowed so to charge the jury. In these jurisdictions, such a charge is deemed faulty as being upon the weight of the evidence, and the extent to which the court may go is to instruct that recent possession is a mere circumstance to be considered by the jury in connection with the rest of the evidence on the question of guilt. *Blankenship v. State*, 55 Ark. 244; *People v. Mitchell*, 55 Cal. 236; *Cooper v. State*, 29 Tex. App. 8, 25 A. S. R. 712. This instruction may properly be given. *Shepperd v. State*, 94 Ala. 102; *State v. Duncan*, 7 Wash. 336, 38 A. S. R. 888. And see *People v. Luchetti*, 119 Cal. 501.

<sup>849</sup> *Campbell v. State*, 150 Ind. 74; *State v. Kelly*, 73 Mo. 608; *State v. Moore*, 101 Mo. 316; *State v. Owsley*, 111 Mo. 450, 454.

<sup>850</sup> *People v. Cline*, 83 Cal. 374; *People v. Hart*, 10 Utah, 204.

<sup>851</sup> *Reg. v. Langmead*, 9 Cox Cr. Cas. 464; *U. S. v. Jones*, 31 Fed. 718; *Bryant v. State*, 116 Ala. 445; *Brooke v. People*, 23 Colo. 375; *State v. Weston*, 9 Conn. 527, 25 A. D. 46; *Keating v. People*, 160 Ill. 480; *Huggins v. People*, 135 Ill. 243, 25 A. S. R. 357; *State v. Whitmer*, 77 Iowa, 557; *State v. Hoffman*, 53 Kan. 700; *State v. Kelly*, 50 La. Ann. 597; *Com. v. Randall*, 119 Mass. 107; *State v. Hogard*, 12 Minn. 293 (Gil. 191); *Robb v. State*, 35 Neb. 285; *State v. Adams*, 2 N. C. (1 Hayw.) 463; *Stockman v. State*, 24 Tex. App. 387, 5 A. S. R. 894; *State v. Bishop*, 51 Vt. 287; *Taliaferro v. Com.*, 77 Va. 411; 8 Current Law, 707.

The presumption cannot arise until a larceny of the property is shown. *Smith v. State*, 133 Ala. 145, 91 A. S. R. 21; *State v. Taylor*, 111 Mo. 538; *Garcia v. State*, 26 Tex. 209, 82 A. D. 605. And the state must identify the property in the accused's possession as that stolen.

It may arise as well in prosecutions for robbery<sup>852</sup> and receiving stolen goods,<sup>853</sup> also in arson,<sup>854</sup> burglary,<sup>855</sup> or murder,<sup>856</sup>

*Garcia v. State*, 26 Tex. 209, 82 A. D. 605. The identity is a question for the jury where the prosecuting witness, although he will not swear that the goods are his, testifies that they resemble his. *Reg. v. Burton*, Dears. Cr. Cas. 282; *State v. Dale*, 141 Mo. 284, 64 A. S. R. 513. See, however, *Reg. v. Dredge*, 1 Cox Cr. Cas. 235.

<sup>852</sup> *Knickerbocker v. People*, 43 N. Y. 177 (semble).

<sup>853</sup> *Reg. v. Langmead*, 9 Cox Cr. Cas. 464; *State v. Guild*, 149 Mo. 370, 73 A. S. R. 395; *Goldstein v. People*, 82 N. Y. 231. *Contra*, *Reg. v. Pratt*, 4 Fost. & F. 315; *Durant v. People*, 13 Mich. 351; *Castleberry v. State*, 35 Tex. Cr. App. 382, 60 A. S. R. 53. And see *People v. Levison*, 16 Cal. 98, 76 A. D. 505.

<sup>854</sup> *State v. Babb*, 76 Mo. 501 (semble). And see *Rickman's Case*, 2 East P. C. 1035.

<sup>855</sup> ENGLAND: *Reg. v. Exall*, 4 Fost. & F. 922.

FLORIDA: *Tilly v. State*, 21 Fla. 242.

GEORGIA: *Gravitt v. State*, 114 Ga. 841, 88 A. S. R. 63; *Falvey v. State*, 85 Ga. 157; *Davis v. State*, 76 Ga. 16; *Lundy v. State*, 71 Ga. 360.

ILLINOIS: *Magee v. People*, 139 Ill. 138; *Sahlinger v. People*, 102 Ill. 241 (semble); *Huggins v. People*, 135 Ill. 243, 25 A. S. R. 357.

IOWA: *State v. Jennings*, 79 Iowa, 513; *State v. La Grange*, 94 Iowa, 60.

MASSACHUSETTS: *Com. v. Millard*, 1 Mass. 6; *Com. v. McGorty*, 114 Mass. 299.

MISSOURI: *State v. Owsley*, 111 Mo. 450; *State v. Moore*, 117 Mo. 395; *State v. Warford*, 106 Mo. 55, 27 A. S. R. 322; *State v. Dale*, 141 Mo. 284, 64 A. S. R. 513.

NEW YORK: *Knickerbocker v. People*, 43 N. Y. 177.

OKLAHOMA: *Johnson v. Ter.*, 5 Okl. 695, 50 Pac. 90.

TEXAS: *Dawson v. State*, 32 Tex. Cr. R. 535, 40 A. S. R. 791; *Favro v. State*, 39 Tex. Cr. R. 452, 73 A. S. R. 950; *Jackson v. State*, 28 Tex. App. 370, 19 A. S. R. 839.

WISCONSIN: *Ryan v. State*, 83 Wis. 486.

And see *People v. Sansome*, 98 Cal. 235; *Short v. State*, 63 Ind. 376, 380. *Contra*, *People v. Hannon*, 85 Cal. 374; *People v. Beaver*, 49 Cal. 57; *State v. Powell*, 61 Kan. 81; *People v. Gordon*, 40 Mich. 716; *People v. Hart*, 10 Utah, 204; *Gravely v. Com.*, 86 Va. 396.

The presumption arises in burglary cases where it appears that the breaking and entering and the larceny were committed at the same

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when these are accompanied by larceny; and other crimes as well, including forgery<sup>857</sup> and procuring base coin with intent to utter it.<sup>858</sup>

(c) **Rebuttal.** The presumption of guilt arising from recent possession may be rebutted. If the accused adduces evidence of facts explaining his possession and tending to show its honesty, the presumption is dispelled, and the question of guilt is one for the jury upon all the evidence.<sup>859</sup>

time, but not otherwise. *State v. Rivers*, 68 Iowa, 611; *State v. Shaffer*, 59 Iowa, 290.

To raise the presumption in a prosecution for burglary, the state must show that the property in the accused's possession was taken from the building which was burglariously entered. *King v. State*, 99 Ga. 686, 59 A. S. R. 251; *Brooks v. State*, 96 Ga. 353; *State v. La Grange*, 94 Iowa, 60, 64 (semble).

Some cases go no farther, in prosecutions for burglary, than to hold that recent possession is admissible in evidence as a material fact, and may, in connection with other circumstances tending to show guilt, justify a conviction. *People v. Hannon*, 85 Cal. 374; *Smith v. People*, 115 Ill. 17; *State v. Shaffer*, 59 Iowa, 290; *State v. Powell*, 61 Kan. 81; *Stuart v. People*, 42 Mich. 255; *State v. Jones*, 19 Nev. 265; *Prince v. State*, 44 Tex. 481; *People v. Hart*, 10 Utah, 204, 209; *State v. Harrison*, 66 Vt. 523, 44 A. S. R. 864; *Gravely v. Com.*, 86 Va. 396; *Wright v. Com.*, 82 Va. 183; *Walker v. Com.*, 28 Grat. (Va.) 969; *Ryan v. State*, 83 Wis. 486; *Neubrandt v. State*, 53 Wis. 89. See, however, *People v. Ah Sing*, 59 Cal. 400.

<sup>856</sup> *Wilson v. U. S.*, 162 U. S. 613; *Kibler v. Com.*, 94 Va. 804.

<sup>857</sup> *Reg. v. James*, 4 Cox Cr. Cas. 90; *Com. v. Talbot*, 2 Allen (Mass.) 161; *State v. Hodges*, 144 Mo. 50.

<sup>858</sup> *Rex v. Fuller*, Russ. & R. 308.

<sup>859</sup> *Thayer*, Prel. Treat. Ev. 328; *Reg. v. Exall*, 4 Fost. & F. 922, 928; *Williams v. State*, 40 Fla. 480, 74 A. S. R. 154; *State v. Tucker*, 76 Iowa, 232, 234; *State v. Gillespie*, 62 Kan. 469, 84 A. S. R. 411; *State v. Scott*, 109 Mo. 226; *State v. Adams*, 2 N. C. (1 Hayw.) 463; *State v. Snell*, 46 Wis. 524.

If the accused adduces evidence which raises a reasonable doubt as to whether he came by the property honestly, the jury must acquit. *Blaker v. State*, 130 Ind. 203; *State v. Manley*, 74 Iowa, 561; *State v. Kirkpatrick*, 72 Iowa, 500. Where the explanation given by the accused is unreasonable or improbable, the burden of proving its

(d) **Sufficiency of possession.** If, in showing the accused's possession, the state incidentally adduces evidence of facts which make it as consistent with innocence as with guilt, the presumption does not arise. Thus, the accused's possession of another's bank note does not raise a presumption of larceny, if the additional fact appears that it was not stolen from the owner, but lost by him.<sup>860</sup>

To raise the presumption, the possession must have been recent after the commission of the crime. Remote possession does not call for an explanation from the accused, nor, without more, justify a conviction.<sup>861</sup>

It is often said that the presumption does not arise unless the accused's possession was personal<sup>862</sup> and exclusive.<sup>863</sup> Thus,

truth is said to lie on him; otherwise the burden is on the state to disprove it. *Reg. v. Crowhurst*, 47 E. C. L. (1 Car. & K.) 370; *Reg. v. Exall*, 4 Fost. & F. 922, 929; *Leslie v. State*, 35 Fla. 171; *Garcia v. State*, 26 Tex. 209, 82 A. D. 605. See, however, *People v. Buelna*, 81 Cal. 135.

<sup>860</sup> *Hunt v. Com.*, 13 Grat. (Va.) 757, 70 A. D. 443.

<sup>861</sup> *Rex v. —*, 2 Car. & P. 459; *Reg. v. Harris*, 8 Cox Cr. Cas. 333; *Brooks v. State*, 96 Ga. 353; *State v. Scott*, 109 Mo. 226; *State v. Warford*, 106 Mo. 55, 27 A. S. R. 322; *Boyd v. State*, 24 Tex. App. 570, 5 A. S. R. 908; *Matlock v. State*, 25 Tex. App. 654, 8 A. S. R. 451; *Jackson v. State*, 28 Tex. App. 370, 19 A. S. R. 839.

Whether or not the possession is so recent as to justify the presumption depends somewhat upon the nature of the article stolen, as whether it might pass readily from hand to hand. *Rex v. Partidge*, 7 Car. & P. 551.

The presumption of guilt is stronger or weaker as the possession is more or less recent. *Cockin's Case*, 2 Lewin Cr. Cas. 235; *Reg. v. Exall*, 4 Fost. & F. 922, 927; *Williams v. State*, 40 Fla. 480, 74 A. S. R. 154; *Gablick v. People*, 40 Mich. 292; *State v. Rights*, 82 N. C. 675.

Possession of stolen goods may nevertheless be a circumstance tending to criminate the accused, even though such a time has elapsed that the possession, of itself, will not afford a presumption of guilt. *State v. Foulk*, 59 Kan. 775; *State v. Miller*, 45 Minn. 521; *State v. Johnson*, 60 N. C. (1 Winst.) 238, 86 A. D. 434.

<sup>862</sup> *Reg. v. Hughes*, 14 Cox, Cr. Cas. 223; *Jackson v. State*, 28 Tex.



the bare fact that stolen property was found in the accused's barn, which was open to all, affords no presumption of guilt, if it does not appear that he knew the property was there.<sup>864</sup> This rule as to exclusiveness of the possession is subject to important qualifications, however.<sup>865</sup>

It has also been said that to induce the presumption the possession must have been such as to involve a distinct and conscious assertion of ownership by the accused in the property.<sup>866</sup>

(e) **Possession as crime per se.** The presumption we have just considered relates to the weight and sufficiency of evi-

App. 370, 19 A. S. R. 839; *Lehman v. State*, 18 Tex. App. 174, 51 A. R. 298. See *Com. v. Bell*, 102 Mass. 163.

<sup>863</sup> *Moncrief v. State*, 99 Ga. 295; *State v. Scott*, 109 Mo. 226; *State v. Warford*, 106 Mo. 55, 27 A. S. R. 322; *Jackson v. State*, 28 Tex. App. 370, 19 A. S. R. 839; *Tallafarro v. Com.*, 77 Va. 411.

<sup>864</sup> *People v. Hurley*, 60 Cal. 74, 44 A. R. 55. And see *State v. Pomeroy*, 30 Or. 16, 25.

<sup>865</sup> The possession required to raise the presumption is not limited to actual custody about the person of the accused. It exists if the goods are in any place under his exclusive control. Accordingly, the goods are in his possession if in his dwelling house, where he and his wife reside alone. *State v. Johnson*, 60 N. C. (1 Winst.) 238, 86 A. D. 434. And see *Harris v. State*, 84 Ga. 269. Otherwise where he and his wife do not live together. *State v. Owsley*, 111 Mo. 450.

Joint actual possession of recently stolen goods justifies the presumption against either possessor. *State v. Raymond*, 46 Conn. 345. And recent possession of one conspirator is admissible against the other. *Clark v. State*, 28 Tex. App. 189, 19 A. S. R. 817.

Where some of the stolen articles were found in the accused's possession, and he offered no satisfactory explanation, he is not acquitted of participation in the crime by the fact that other of the articles were found with a fellow lodger, who, being accused of the crime, ran away. *Grimes v. State*, 77 Ga. 762, 4 A. S. R. 112.

Possession of the accused jointly with others, although not sufficient of itself to justify a conviction, may nevertheless be considered by the jury in connection with other circumstances tending to show guilt. *Moncrief v. State*, 99 Ga. 295.

<sup>866</sup> *Lehman v. State*, 18 Tex. App. 174, 51 A. R. 298; *Jackson v. State*, 28 Tex. App. 370, 19 A. S. R. 839.

dence. It concerns possession as affording evidence of a crime, not as constituting a crime in itself, and is thus to be distinguished from those rules of substantive criminal law which relate to possession of certain kinds of property as a crime in itself. As to these latter rules, by the better opinion, a man is not punishable at common law for merely having possession of articles with intent to commit a crime, as of burglar's tools with intent to commit burglary,<sup>867</sup> stamps or dies with intent to counterfeit coin,<sup>868</sup> counterfeit money with intent to utter it,<sup>869</sup> or obscene prints with intent to publish them;<sup>870</sup> though it is an indictable offense at common law to procure these articles with intent to commit a crime by means of them.<sup>871</sup> In some states, however, the rule has been altered by statute so as to make the mere possession of such articles punishable.<sup>872</sup>

<sup>867</sup> Clark & M. Crimes (2d Ed.) § 117.

<sup>868</sup> Clark & M. Crimes (2d Ed.) § 117. *Contra*, Rex v. Sutton, Lee t. Hardw. 370, 2 Strange, 1074.

<sup>869</sup> Rex v. Heath, Russ. & R. 184. *Contra*, Rex v. Parker, 1 Leach Cr. Cas. 41.

<sup>870</sup> Dugdale v. Reg., 1 El. & Bl. 435, Dears. Cr. Cas. 64; Rex v. Rosenstein, 2 Car. & P. 414 (semble).

<sup>871</sup> Rex v. Fuller, Russ. & R. 308; Dugdale v. Reg., 1 El. & Bl. 435, Dears. Cr. Cas. 64; Reg. v. Roberts, Dears. Cr. Cas. 539, 7 Cox Cr. Cas. 39.

See page 370, *supra*, as to effect of possession as evidence of procuring base coin with intent to utter it.

Possession of explosives by one having no legitimate need of them, if accompanied by declarations that he intended to use them for a particular unlawful purpose, raises a presumption that he procured them to be used for that purpose. *Hronek v. People*, 134 Ill. 139, 23 A. S. R. 652.

<sup>872</sup> Clark & M. Crimes (2d Ed.) § 117; *People v. McDonnell*, 80 Cal. 285, 13 A. S. R. 159; *Com. v. Tivnon*, 8 Gray (Mass.) 375, 69 A. D. 248; *Com. v. Price*, 10 Gray (Mass.) 472, 71 A. D. 668.

*Possession of lottery tickets and winning lists.* *Ford v. State*, 85 Md. 465, 41 L. R. A. 551.

*Possession of marked bottles without consent of owner.* *People v. Cannon*, 139 N. Y. 32, 36 A. S. R. 668.

## **CHAPTER II.**

### **JUDICIAL NOTICE.**

**ART. I. DEFINITION AND SCOPE.**

**ART. II. GOVERNMENTAL AFFAIRS.**

**ART. III. MATTERS OF NOTORIETY.**

**ART. IV. DISCRETION OF COURT.**

**ART. V. PRELIMINARY INVESTIGATION BY COURT.**

**ART. VI. PRIVATE KNOWLEDGE OF COURT.**

**ART. VII. KNOWLEDGE OF JURORS.**

**ART. VIII. EFFECT OF JUDICIAL NOTICE.**

**ART. IX. IMPEACHMENT OF JUDICIAL KNOWLEDGE.**

**ART. X. JUDICIAL NOTICE ON APPEAL.**

#### **ART. I. DEFINITION AND SCOPE.**

§ 93. Various principles may dispense absolutely or provisionally with the necessity of adducing evidence of the facts on which a party rests his right of action or defense. Of these, the rules relating to burden of proof and presumptions have already been considered. The principle of judicial notice is next to be examined.

This principle may be said to rest on two ancient maxims: "Manifesta [or notoria] non indigent probatione," and "Non refert quid notum sit judici si notum non sit in forma judicii." "The maxim that what is known need not be proved," says Professor Thayer,<sup>1</sup> "may be traced far back in the civil and the canon law; indeed, it is probably coeval with legal procedure

<sup>1</sup> Thayer, Prel. Treat. Ev. 277. See § 128, *infra*.

itself. We find it as a maxim in our own books, and it is applied in every part of our law. It is qualified by another principle, also very old, and often overtopping the former in its importance,—‘Non refert quid notum sit judici si notum non sit in forma judicii.’ These two maxims seem to intimate the whole doctrine of judicial notice. It has two aspects,—one regarding the liberty which the judicial functionary has in taking things for granted, and the other the restraints that limit him.”

The doctrine of judicial notice is not peculiar to the law of evidence in the proper sense of the word. “It does, indeed, find in the region of evidence a frequent and conspicuous application; but the habit of regarding this topic as a mere title in the law of evidence obscures the true conception of both subjects. That habit is quite modern. The careful observer will notice that a very great proportion of the cases involving judicial notice raise no question at all in that part of the law; they relate to pleading,<sup>2</sup> [to the construction of statutes,<sup>3</sup>] to the construction of the record or of other writings,<sup>4</sup> the legal

<sup>2</sup> *West v. Rae*, 33 Fed. 45. Thus, a pleading or an indictment, otherwise fatally indefinite, may be aided by facts of which the court may take judicial notice, and so sustained as against a general demurrer. *U. S. v. Johnson*, 2 Sawy. 482, Fed. Cas. No. 15,488; *De Baker v. Southern Cal. R. Co.*, 106 Cal. 257, 46 A. S. R. 237; *Schlicht v. State*, 56 Ind. 174; *Jarvis v. Robinson*, 21 Wis. 530, 94 A. D. 560, 561.

<sup>3</sup> Thus, in construing a statute, whether as to meaning, operation, or validity, the court may take judicial notice of matters generally known within the jurisdiction. *Moses v. U. S.*, 16 App. D. C. 428, 50 L. R. A. 532; *Bloxham v. Consumers' Elec. Light & S. R. Co.*, 36 Fla. 519, 51 A. S. R. 44, 48; *Compagnie Francaise v. State Board of Health*, 51 La. Ann. 645, 56 L. R. A. 795; *Prince v. Crocker*, 166 Mass. 347, 32 L. R. A. 610; *State v. Polk County*, 87 Minn. 325, 60 L. R. A. 161; *Redell v. Moores*, 63 Neb. 219, 55 L. R. A. 740; *State v. Nelson*, 52 Ohio St. 88, 26 L. R. A. 317.

<sup>4</sup> *North American Fire Ins. Co. v. Throop*, 22 Mich. 146, 7 A. R. 638, 646; *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338, 38 A. R. 434, 438.

definition of words,<sup>5</sup> the interpretation of conduct,<sup>6</sup> the process of reasoning,<sup>7</sup> and the regulation of trials.<sup>8</sup> In short, the cases relate to the exercise of the function of judicature in all its scope and at every step. \* \* \* The subject of judicial notice, then, belongs to the general topic of legal or judicial reasoning. It is, indeed, woven into the very texture of the judicial function. In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this, with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit.'"<sup>9</sup> The doctrine does concern the law of evidence in this, however: that it tells when evidence need not be adduced of certain classes of facts by a party wishing to take advantage of them. For this reason it is not only customary, but proper, that the subject of judicial notice should be examined in a treatise on the law of evidence.

The power to take judicial notice may be exercised, not only in the trial, but also in preliminary proceedings,<sup>10</sup> proceedings for new trial,<sup>11</sup> and on appeal or writ of error.<sup>12</sup> And in special statutory proceedings also the power may be exerted.<sup>13</sup>

<sup>5</sup> See §§ 112, 116, *infra*.

<sup>6</sup> *Whitney v. U. S.*, 167 U. S. 529, 546; *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208, 97 A. D. 96.

<sup>7</sup> See *Chase v. Maine Cent. R. Co.*, 77 Me. 62, 52 A. R. 744, 746.

<sup>8</sup> See § 99(c), *infra*.

<sup>9</sup> Thayer, *Prel. Treat. Ev.* 301. In this connection, attention may be called to the distinction between real or demonstrative or autoptic evidence, on the one hand, which involves inspection of a thing introduced in evidence, and judicial notice, on the other hand, which is taking cognizance of a fact without evidence. See Thayer, *Prel. Treat. Ev.* 280, note. See, generally, 7 *Current Law*, 1512.

<sup>10</sup> *Heaston v. Cincinnati & F. W. R. Co.*, 16 Ind. 275, 79 A. D. 430.

<sup>11</sup> *Western & A. R. Co. v. Roberson*, 22 U. S. App. 187, 202; *Ham v. Ham*, 39 Me. 263, 266.

<sup>12</sup> See § 132, *infra*.

A fact may be either ultimate or evidentiary, and judicial notice may be taken of either. Sometimes the court notices the ultimate fact, in which case facts evidentiary of it become immaterial. Sometimes the court cannot recognize the ultimate fact, but notices facts evidentiary thereof. Thus, while the court cannot take judicial notice of the laws of a foreign state, yet it may recognize printed books of its statutes and printed reports of its courts, if they are of acknowledged or ascertained authority, as competent evidence of the foreign law.<sup>14</sup> And there are various other means of proof of which the court will take judicial notice, as where almanacs, dictionaries, tables, etc., are admitted as evidence of the truth of their contents.<sup>15</sup> This class of cases must be distinguished from that in which the court takes notice of the ultimate facts, and then resorts to the books, etc., for information. In this latter class the books need not be admitted in evidence;<sup>16</sup> the court may consult them in the exercise of its function of taking judicial notice of the facts which they authenticate.<sup>17</sup> It may be observed as a matter of fact, however, that the book itself is often admitted in evidence even in cases where the court might properly take

<sup>13</sup> *Steenerson v. Great Northern R. Co.*, 69 Minn. 353.

<sup>14</sup> *Thayer*, Prel. Treat. Ev. 306; *The Pawashick*, 2 Lowell, 142, *Thayer*, Cas. Ev. 31, Fed. Cas. No. 10,851; *Ennis v. Smith*, 14 How. (U. S.) 400, 426, 430; *Talbot v. Seeman*, 1 Cranch (U. S.) 1. Judicial notice of foreign law, see § 105, *infra*. The mode of proving the law of a sister state, the law of England and dependencies, and the law of other foreign countries, presents a question with which the present volume is not concerned.

<sup>15</sup> *Thayer*, Prel. Treat. Ev. 307; *Rex v. Holt*, 5 Term R. 436; *Rex v. Withers*, 5 Term R. 442, note; *Dupays v. Shepherd*, Holt, 296; *Adler v. State*, 55 Ala. 16; *Miller v. Indianapolis*, 123 Ind. 196; *Munshower v. State*, 55 Md. 11, 39 A. R. 414, *Thayer*, Cas. Ev. 21. Judicial notice of matters of science, art, etc., see §§ 110, 111, *infra*. Mortality tables, see § 113, *infra*. Photographs, see § 111, *infra*.

<sup>16</sup> See § 128, *infra*.

<sup>17</sup> *Thayer*, Prel. Treat. Ev. 307. See § 123, *infra*.

judicial notice of the matter of its contents. While this is an unnecessary course, the result is the same in fact and in law.<sup>18</sup>

As to the reason of the principle of judicial notice, it is largely one of common sense. Common sense dispenses with formal proof of a thing which is a matter of common knowledge, and obviously susceptible of establishment by indisputable evidence, or which is a matter known to the court as a part of the government.<sup>19</sup> The principle is founded also on the necessity of disposing of trials within a reasonable time. It is a rule for expediting justice.

Stating the rule broadly, it may be said that the courts will, without evidence, take judicial notice of whatever ought to be generally known within the limits of their territorial jurisdiction.<sup>20</sup> Some things are judicially noticed by statutory direction.<sup>21</sup> Other things are noticed or not according to the judicial precedents, which have omitted some things and included others in a way not always reconcilable with a general principle. Still other things are noticed or not upon a principle founded upon reason and common sense. The things of which judicial notice is taken may be said to fall under one or the

<sup>18</sup> 3 Greenl. Ev. § 269; *State v. Morris*, 47 Conn. 179; *Wilson v. Van Leer*, 127 Pa. 371. See note 440, *infra*, for additional cases.

<sup>19</sup> *McKelvey*, Ev. 19; *State v. Intoxicating Liquors*, 73 Me. 278.

<sup>20</sup> *Lanfear v. Mestier*, 18 La. Ann. 497, 89 A. D. 658, and note.

<sup>21</sup> The statute is usually in the form of a requirement that certain facts shall be sufficiently proved by certain documents, or that certain documents shall be taken as true upon production, rather than in the form of a declaration that the court shall take notice of such things without evidence. However, the form is a matter of little importance in practice. Whether the document mentioned in the statute be regarded as evidence of the fact, and admitted to prove it, or whether the court take judicial notice of the fact upon inspection of the document, and exclude the document from evidence, the result is the same. The fact is before the court and jury for their consideration. See note 18, *supra*, to the same effect.

other of two heads: (1) Matters of governmental concern, and  
(2) matters deemed notorious.<sup>22</sup>

## ART. II. GOVERNMENTAL AFFAIRS.

### A. Domestic Government.

Existence, extent, and subdivisions, § 95.

Seal, § 96.

Executive and administrative officers, § 97.

(a) Existence, accession, and term of office.

(b) Powers, privileges, and duties.

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(a) Currency.

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### B. Foreign Government.

Existence, title, and extent, § 102.

Flag and seal, § 103.

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Laws, § 105.

(a) General rules.

(b) Exceptions and qualifications.

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<sup>22</sup> See Best, Ev. § 252. *Lex non requirit verificare quod apparet curiae. Quod constat curiae opere testium non indiget. Manifesta [or notoria] non indigent probatione.*



**C. International Affairs.**

Law, § 106.

Treaties, § 107.

War and peace, § 108.

§ 94. In England, the administration of justice is carried on by the sovereign, and his agents for doing so are the courts. "The sovereign, in the lapse of time," says Professor Thayer,<sup>23</sup> "has lost something of his concreteness, where he has not lost it all; but when the king, long ago, sat personally in court, and in later times, when judicial officers were in a true and lively sense the representatives and even mere deputies of the king, it was an obvious and easily intelligible thing that courts should notice without evidence whatever the king himself knew or did in the exercise of any of his official functions, whether directly or through other high officers." In the United States, where the judiciary forms one of the three co-ordinate branches of the government, state and national, the principle is given full application; and consequently here, as in the mother country, the courts take judicial notice of all that concerns the government in all its departments, both internally and externally. It has been suggested that the true reason of the principle is that it would be against the dignity of the government to allow matters concerning it to be disputed in private litigation, and that the courts take judicial notice of such matters, and thus withdraw them from private dispute, from reasons of public policy.<sup>24</sup>

**A. DOMESTIC GOVERNMENT.****§ 95. Existence, extent, and subdivisions.**

The courts take judicial notice of the existence and terri-

<sup>23</sup> Thayer, *Prel. Treat. Ev.* 299. And see *Taylor v. Barclay*, 2 Sim. 213, Thayer, *Cas. Ev.* 23.

<sup>24</sup> McKelvey, *Ev.* 24.

torial extent of the state of whose government they form a part,<sup>25</sup> and its colonies;<sup>26</sup> and of the local divisions of the country, as states,<sup>27</sup> counties,<sup>28</sup> cities,<sup>29</sup> towns and villages,<sup>30</sup> school

<sup>25</sup> *Jones v. U. S.*, 137 U. S. 202; *Carey v. Reeves*, 46 Kan. 571; *State v. Wagner*, 61 Me. 178; *State v. Pennington*, 124 Mo. 388; *State v. Dunwell*, 3 R. I. 127; *Ogden v. Lund*, 11 Tex. 688.

<sup>26</sup> *Cooke v. Wilson*, 1 C. B. (N. S.) 153.

<sup>27</sup> *Thorson v. Peterson*, 9 Fed. 517; *King v. American Transp. Co.*, 1 Flip. 1, Fed. Cas. No. 7,787.

<sup>28</sup> *Lyell v. Lapeer County*, 6 McLean, 446, Fed. Cas. No. 8,618; *Smitha v. Flournoy's Adm'r*, 47 Ala. 345; *People v. Ebanks*, 117 Cal. 652, 40 L. R. A. 269; *Gooding v. Morgan*, 70 Ill. 275; *Kan. City, Ft. S. & G. R. Co. v. Burge*, 40 Kan. 736; *Com. v. Desmond*, 103 Mass. 445, 447; *State v. Pennington*, 124 Mo. 388; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *State v. Snow*, 117 N. C. 774; *Solyer v. Romanet*, 52 Tex. 562.

The court will take notice that there is but one county of a given name in the state. *People v. Thompson*, 28 Cal. 214, 218. The situation, general and relative, of the counties in the state, is noticed judicially. *St. Louis, I. M. & S. R. Co. v. Petty*, 57 Ark. 359, 20 L. R. A. 434; *Boggs v. Clark*, 37 Cal. 236; *Denny v. State*, 144 Ind. 503, 31 L. R. A. 726; *Wright v. Hawkins*, 28 Tex. 452; *State v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561. The courts do not take judicial notice that a county has adopted township organization. *State v. Cleveland*, 80 Mo. 108. *Contra*, *Rock Island County v. Steele*, 31 Ill. 543. It has been held that counties will be judicially noticed only when created by statute, and not when created by commissioners under a general law. *Buckinghouse v. Gregg*, 19 Ind. 401.

<sup>29</sup> *Kan. City, Ft. S. & G. R. Co. v. Burge*, 40 Kan. 736; *Smith v. Janesville*, 52 Wis. 680. See § 100(b), *infra*, as to taking judicial notice of statutes relating to cities.

The court may take judicial notice that a certain town is one of the smaller towns of the state. *Western Union Tel. Co. v. Robinson*, 97 Tenn. 638, 34 L. R. A. 431.

The extent of ports is judicially known to the courts. *Fazakerley v. Wiltshire*, 1 Strange, 462, 469; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420.

<sup>30</sup> *Kidder v. Blaisdell*, 45 Me. 461; *La Grange v. Chapman*, 11 Mich. 499; *Morgan v. State*, 64 Miss. 511; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *Chapman v. Wilber*, 6 Hill (N. Y.) 475; *French v. Barre*.

districts,<sup>31</sup> congressional districts,<sup>32</sup> revenue districts,<sup>33</sup> and state and federal judicial districts,<sup>34</sup> and the geographical location and relative positions thereof.<sup>35</sup> Thus, the court will notice, without evidence, that a city or town is in the state,<sup>36</sup> in a certain county,<sup>37</sup> and whether it is the county seat.<sup>38</sup> Municipi-

58 Vt. 567; *Saukville v. State*, 69 Wis. 178. See § 100(b), *infra*, as to taking judicial notice of statutes in reference to towns.

Towns and wards mentioned in a public statute will be noticed judicially. *People v. Breese*, 7 Cow. (N. Y.) 429; *State v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561.

<sup>31</sup> *Swails v. State*, 4 Ind. 516.

<sup>32</sup> *U. S. v. Johnson*, 2 Sawy. 482, Fed. Cas. No. 15,488.

<sup>33</sup> *U. S. v. Jackson*, 104 U. S. 41.

<sup>34</sup> *U. S. v. Johnson*, 2 Sawy. 482, Fed. Cas. No. 15,488; *People v. Robinson*, 17 Cal. 363; *Boggs v. Clark*, 37 Cal. 236; *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Neb. 161; *State v. Ray*, 97 N. C. 510, 512; *Com. v. Fitzpatrick*, 121 Pa. 109, 6 A. S. R. 757, 758.

<sup>35</sup> *Harvey v. Wayne*, 72 Me. 430; *State v. Simpson*, 91 Me. 83; *Lena-han v. People*, 3 Hun (N. Y.) 165, 167; *Siegbert v. Stiles*, 39 Wis. 533; *State v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561. As to the relative location of counties, see note 28, *supra*.

<sup>36</sup> *King v. Kent's Heirs*, 29 Ala. 542; *Woodward v. Chicago & N. W. R. Co.*, 21 Wis. 309.

The court will not assume that there is only one city of a given name in the world. *Thayer*, Prel. Treat. Ev. 309; *Kearney v. King*, 2 Barn. & Ald. 301, *Thayer*, Cas. Ev. 36; *Riggin v. Collier*, 6 Mo. 568; *Andrews v. Hoxie*, 5 Tex. 171; *Whitlock v. Castro*, 22 Tex. 108. And see *Com. v. Wheeler*, 162 Mass. 429, 431.

<sup>37</sup> *Smitha v. Flournoy's Adm'r*, 47 Ala. 345; *State v. Powers*, 25 Conn. 48; *State v. Tootle*, 2 Har. (Del.) 541; *Clayton v. May*, 67 Ga. 769; *Gilbert v. National Cash Register Co.*, 176 Ill. 288; *Sullivan v. People*, 122 Ill. 385; *Jones v. Lake View*, 151 Ill. 663; *Luck v. State*, 96 Ind. 16; *Indianapolis & C. R. Co. v. Stephens*, 28 Ind. 429; *Steinmetz v. Versailles & O. Turnpike Co.*, 57 Ind. 457; *State v. Reader*, 60 Iowa, 527; *Kansas City, Ft. S. & G. R. Co. v. Burge*, 40 Kan. 736; *Martin v. Martin*, 51 Me. 366; *Ham v. Ham*, 39 Me. 263, 266; *People v. Curley*, 99 Mich. 238; *Baumann v. Granite Sav. Bank & T. Co.*, 66 Minn. 227; *Vanderwerker v. People*, 5 Wend. (N. Y.) 530; *People v. Wood*, 131 N. Y. 617; *Solyer v. Romanet*, 52 Tex. 562; *Schilling v. Ter.*, 2 Wash. T. 283. It is held otherwise, in some states, in the absence of statute

pal subdivisions are noticed judicially for some purposes. The courts will generally notice, without evidence, as a matter of notoriety, the subdivision of urban property into blocks and lots.<sup>39</sup> But judicial notice is not taken of the precise location of a lot in a subdivision of urban lands, with respect to city, township, or other divisional lines, without the aid of a public statute.<sup>40</sup> If established by act of the legislature, judicial notice is taken of the streets of a city, their location and relation to one another;<sup>41</sup> but if established by dedication or by ordinance, these matters must be proved the same as any other fact.<sup>42</sup>

(*Hoffman v. State*, 12 Tex. App. 406; *Boston v. State*, 5 Tex. App. 383, 32 A. R. 575; *Vivian v. State*, 16 Tex. App. 262); unless the town is the county seat, in which case its location within the county is judicially noticed (*Carson v. Dalton*, 59 Tex. 500); or unless it is or has been the state capital (*Lewis v. State* [Tex. Cr. App.] 24 S. W. 903).

While the court may know that there is a town of a given name in a certain county, yet, it has been held, the court cannot assume that that name, when used in an indictment without other words of description, has reference to the town. *Com. v. Wheeler*, 162 Mass. 429.

Judicial notice of distances between places in countries, see § 110(c), *infra*.

<sup>38</sup> *People v. Faust*, 113 Cal. 172; *People v. Etting*, 99 Cal. 577; *State v. Pennington*, 124 Mo. 388; *Carson v. Dalton*, 59 Tex. 500; *Whitener v. Belknap & Co.*, 89 Tex. 273.

<sup>39</sup> *Sever v. Lyons*, 170 Ill. 395; *Herrick v. Morrill*, 37 Minn. 250, 5 A. S. R. 841; *McMaster v. Morse*, 18 Utah, 21.

<sup>40</sup> *Gunning v. People*, 189 Ill. 165, 82 A. S. R. 433. Nor will it be noticed that a particular number on a certain street in a named city is in a given municipal ward or district. *Allen v. Scharringhausen*, 8 Mo. App. 229.

<sup>41</sup> *Diggins v. Hartshorne*, 108 Cal. 154; *Walsh v. Missouri P. R. Co.*, 102 Mo. 582, 589. See *Miller v. Indianapolis*, 123 Ind. 196; *Poland v. Dreyfous*, 48 La. Ann. 83.

In construing a statute relating to particular municipal grounds, the court may take judicial notice of the situation of the contiguous streets and squares. *Prince v. Crocker*, 166 Mass. 347, 32 L. R. A. 610.

<sup>42</sup> *Diggins v. Hartshorne*, 108 Cal. 154; *Cicotte v. Anciaux*, 53 Mich. 227. The court will not take judicial notice that a named street is

Upon the same principle the courts of a state will take judicial notice of the location of Indian reservations therein,<sup>43</sup> and of the public surveys and the usual divisions and subdivisions thereof.<sup>44</sup> Private surveys are not noticed judicially,<sup>45</sup>

not in a certain county, although a street of that name may be generally known to be in another county. *Humphreys v. Budd*, 9 Dowl. 1000. The court has refused to take judicial notice that a named street is a thoroughfare. *Grant v. Moser*, 5 Man. & G. 123, 129. *Contra*, *Whittaker v. Elighth Ave. R. Co.*, 5 Rob. [N. Y.] 650. The courts cannot take official notice of the width of streets or of sidewalks in a city, nor of ordinances relating to them. *Porter v. Waring*, 69 N. Y. 250. The condition of the streets of a particular city, in any respect, at a given time and place, cannot be noticed judicially unless a matter of notoriety. *Lenahan v. People*, 3 Hun (N. Y.) 164. Particular street intersections cannot be noticed judicially. *Pa. Co. v. Frana*, 13 Ill. App. 91.

<sup>43</sup> *French v. Lancaster*, 2 Dak. 346; *Beebe v. U. S. (Dak.)* 11 N. W. 505.

<sup>44</sup> *Webb v. Mullins*, 78 Ala. 111; *Quinn v. Windmiller*, 67 Cal. 461; *Kile v. Yellowhead*, 80 Ill. 208; *Gooding v. Morgan*, 70 Ill. 275; *Gardner v. Eberhart*, 82 Ill. 316; *Hill v. Bacon*, 43 Ill. 477; *Murphy v. Hendricks*, 57 Ind. 593; *Mossman v. Forrest*, 27 Ind. 233; *Peck v. Sims*, 120 Ind. 345; *Wright v. Phillips*, 2 G. Greene (Iowa) 191; *Stoddard v. Sloan*, 65 Iowa, 680; *Dexter v. Cranston*, 41 Mich. 448; *Quinn v. Champagne*, 38 Minn. 322; *Muse v. Richards*, 70 Miss. 581; *Atwater v. Schenck*, 9 Wis. 160. Public statutes relating to surveys, see § 100(b), *infra*.

Judicial notice is not taken of the quantity of land within given courses and distances. *Tison v. Smith*, 8 Tex. 147.

If lands are described by reference to the section, township, and range of the government survey, the court must take judicial notice of the county in which they are located. *Rogers v. Cady*, 104 Cal. 288, 43 A. S. R. 100; *Bryan v. Scholl*, 109 Ind. 367; *Fogg v. Holcomb*, 64 Iowa, 621. If they are not so described, however, the court cannot take notice of what county they are in. *Kretschmar v. Meehan*, 74 Minn. 211.

The court will take notice that a "block" is not a subdivision of a "township," in any sense of the term, and that it is applied only to subdivisions of platted cities, towns, or villages. *Herrick v. Morrill*, 37 Minn. 250, 5 A. S. R. 841.

The federal courts also take notice judicially of the public surveys. *Smith v. Green*, 41 Fed. 455.

nor can the court take notice that particular lands were at a time specified a part of the public domain.<sup>46</sup>

The area and boundaries of local subdivisions may be judicially noticed in a general way;<sup>47</sup> but the courts cannot take official notice of their precise boundaries,<sup>48</sup> unless they are described in a public statute.<sup>49</sup>

Matters of geography not relating directly to the territorial extent of the state, its boundaries, and political subdivisions, are considered in another connection.<sup>50</sup>

#### § 96. Seal.

The law assumes that the seal of the state is known to all her judges, and they accordingly require no evidence that an impression purporting to be the seal of state is in fact such. Of its genuineness they take judicial notice.<sup>51</sup>

#### § 97. Executive and administrative officers.

(a) **Existence, accession, and term of office.** The principal officers of the government, state and federal,<sup>52</sup> such as the

<sup>46</sup> *Campbell v. West*, 86 Cal. 197.

<sup>47</sup> *Schwerdtle v. Placer County*, 108 Cal. 589.

<sup>48</sup> *Denny v. State*, 144 Ind. 503, 31 L. R. A. 726; *Jackson County Com'rs v. State*, 147 Ind. 476; *Kan. City, Ft. S. & G. R. Co. v. Burge*, 40 Kan. 736; *Ham v. Ham*, 39 Me. 263, 266; *In re Independence Ave. Boulevard*, 128 Mo. 272; *State v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561; *Houlton v. Chicago, St. P., M. & O. R. Co.*, 86 Wis. 59.

<sup>49</sup> *Brune v. Thompson*, 2 Q. B. 789; *Goodwin v. Appleton*, 22 Me. 453.

<sup>50</sup> *De Baker v. Southern Cal. R. Co.*, 106 Cal. 257, 46 A. S. R. 237; *Ross v. Reddick*, 1 Scam. (Ill.) 73; *Kan. City, Ft. S. & G. R. Co. v. Burge*, 40 Kan. 736; *State v. Jackson*, 39 Me. 291; *Com. v. Springfield*, 7 Mass. 9; *State v. Pennington*, 124 Mo. 388; *Wright v. Hawkins*, 28 Tex. 452.

<sup>51</sup> See § 110(c), *infra*.

<sup>52</sup> *Yount v. Howell*, 14 Cal. 465; *Chicago & A. R. Co. v. Keegan*, 152 Ill. 413, 416; *Com. v. Dunlop*, 89 Va. 431. See *Lane's Case*, 2 Coke, 16.

<sup>53</sup> *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 90 A. D. 575; *Major*

chief executive,<sup>53</sup> cabinet officers,<sup>54</sup> senators,<sup>55</sup> the heads of departments and their deputies,<sup>56</sup> and various commissioned officers,<sup>57</sup> are recognized by the domestic courts without evidence; and the same is true of the time of their accession to office,<sup>58</sup> and their terms of service.<sup>59</sup> This rule applies to county officers also,<sup>60</sup> but not to their deputies,<sup>61</sup> unless they are appointed pursuant to statutory authority.<sup>62</sup> Thus, judicial notice is taken of the appointment and retirement of sheriffs;<sup>63</sup>

v. State, 2 Sneed (Tenn.) 11. Judicial officers, see § 99(d), *infra*. Foreign officers, see § 104, *infra*.

<sup>53</sup> Major v. State, 2 Sneed (Tenn.) 11; Dewees v. Colo. County, 32 Tex. 570.

<sup>54</sup> Rex v. Jones, 2 Camp. 131; Walden v. Canfield, 2 Rob. (La.) 466.

<sup>55</sup> Walden v. Canfield, 2 Rob. (La.) 466.

<sup>56</sup> Keyser v. Hitz, 133 U. S. 138, 146; York & M. L. R. Co. v. Winana, 17 How. (U. S.) 30; People v. Johr, 22 Mich. 461; Major v. State, 2 Sneed (Tenn.) 11.

<sup>57</sup> Cary v. State, 76 Ala. 78; Follain v. Lefevre, 3 Rob. (La.) 13.

<sup>58</sup> Cary v. State, 76 Ala. 78; Hizer v. State, 12 Ind. 330; Lindsey v. Attorney General, 33 Miss. 508; State v. Williams, 5 Wis. 308.

<sup>59</sup> Cary v. State, 76 Ala. 78; Stubbs v. State, 53 Miss. 437.

<sup>60</sup> Wetherbee v. Dunn, 32 Cal. 106; Dyer v. Flint, 21 Ill. 80, 74 A. D. 73; Templeton v. Morgan, 16 La. Ann. 438; Fancher v. De Montegre, 1 Head (Tenn.) 39.

The treasurer of a school district has been judicially noticed in Wisconsin. State v. Dahl, 65 Wis. 510. Justices of the peace and county clerks, see § 99(d), *infra*.

<sup>61</sup> Land v. Patteson, Minor (Ala.) 14; State Bank v. Curran, 10 Ark. 142; Joyce v. Joyce, 5 Cal. 449; Slaughter v. Barnes, 3 A. K. Marsh. (Ky.) 412, 13 A. D. 190.

The courts cannot take judicial notice of a deputy marshal. Ward v. Henry, 19 Wis. 76, 88 A. D. 672.

<sup>62</sup> Himmelmann v. Hoadley, 44 Cal. 213; Norvell v. McHenry, 1 Mich. 227. And see Martin v. Aultman, 80 Wis. 150.

<sup>63</sup> Ragland v. Wynn's Adm'r, 37 Ala. 32; Ingram v. State, 27 Ala. 17; Thompson v. Haskell, 21 Ill. 215, 74 A. D. 98; Slaughter v. Barnes, 3 A. K. Marsh. (Ky.) 412, 13 A. D. 190; State v. Megaarden, 85 Minn. 41, 89 A. S. R. 534; Major v. State, 2 Sneed (Tenn.) 11; Alexander v. Burnham, 18 Wis. 199.

This rule does not apply to constables, however. State v. Manley, 1

and the notaries public in a given county will be judicially noticed by the courts sitting therein.<sup>64</sup>

(b) **Powers, privileges, and duties.** The powers and duties of public officers whose existence will be recognized judicially will also be noticed by the courts, especially when prescribed by statute.<sup>65</sup> And judicial notice is taken, not only of the powers, but also of the privileges, of the chief executive of the state.<sup>66</sup>

(c) **Acts.** Doings of the executive department are noticed judicially by the courts.<sup>67</sup> Thus, public proclamations issued by the executive department of the government, state or national, are judicially noticed, the same as legislative acts.<sup>68</sup> And the same is true of messages and other documents transmitted by the executive to the legislative branch of the government, and of many official reports.<sup>69</sup> Military orders given in time of war may also be officially noticed by the courts, where they directly affect the civil government of which the

Overt. (Tenn.) 428; *Doe d. Broughton v. Blackman*, 1 D. Chip. (Vt.) 109.

<sup>64</sup> *Denmead v. Maack*, 2 MacArthur (D. C.) 475; *Hertig v. People*, 159 Ill. 237, 50 A. S. R. 162; *Cox v. Stern*, 170 Ill. 442, 62 A. S. R. 385; *Stoddard v. Sloan*, 65 Iowa, 680.

<sup>65</sup> *Cary v. State*, 76 Ala. 78; *Sacramento County v. Cent. Pac. R. Co.*, 61 Cal. 250, 254; *Jones v. Lake View*, 151 Ill. 663; *Inglis v. State*, 61 Ind. 212; *Lindsey v. Attorney General*, 33 Miss. 508, 529; *People v. Lyman*, 2 Utah, 30, 34.

<sup>66</sup> *Elderton's Case*, 2 Ld. Raym. 978, 980.

<sup>67</sup> *Prince v. Skillin*, 71 Me. 361, 36 A. R. 325. Judicial notice of administrative rules and regulations, see § 100(c), *infra*.

<sup>68</sup> *Jones v. U. S.*, 137 U. S. 202; *Armstrong v. U. S.*, 13 Wall. (U. S.) 154; *Dowdell v. State*, 58 Ind. 333; *Whiton v. Albany City Ins. Co.*, 109 Mass. 24, 30. And see *Perkins v. Rogers*, 35 Ind. 124, 9 A. R. 639. Especially is this so if the proclamation affects matters relating to the court's jurisdiction. *Beebe v. U. S. (Dak.)* 11 N. W. 505. Proclamations of peace and war, see § 108, *infra*.

<sup>69</sup> *Kirby v. Lewis*, 39 Fed. 66; *Wells v. Missouri P. R. Co.*, 110 Mo. 286, 15 L. R. A. 847.



court forms a part.<sup>70</sup> However, it is not the duty of the courts to take judicial notice of the execution of a public statute by executive officers of the government,<sup>71</sup> unless their acts have been continuous, and amount to a practical construction of the statute.<sup>72</sup>

(d) **Signature and seal.** The courts will take judicial notice of the signatures of public officials, not only high state and federal officers,<sup>73</sup> but many subordinate officers as well.<sup>74</sup> Thus, judicial notice is taken of the signature of the chief executive of the state or nation,<sup>75</sup> and also of county registers and recorders.<sup>76</sup> And the signature and seal of a notary public are taken notice of judicially, and sufficiently authenticate his acts.<sup>77</sup>

<sup>70</sup> *Lanfear v. Mestier*, 18 La. Ann. 497, 39 A. D. 658; *Taylor v. Graham*, 18 La. Ann. 656, 39 A. D. 699; *New Orleans Canal & B. Co. v. Templeton*, 20 La. Ann. 141, 96 A. D. 385. *Contra*, *Burke v. Miltenberger*, 19 Wall. (U. S.) 519.

The same is true of like orders issued in the period of reconstruction. *Gates v. Johnson County*, 36 Tex. 144.

<sup>71</sup> *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.) 1.

<sup>72</sup> *Bloxham v. Consumers' Elec. L. & S. R. Co.*, 36 Fla. 519, 51 A. S. R. 44, 48; *Westbrook v. Miller*, 56 Mich. 148.

<sup>73</sup> *Wetherbee v. Dunn*, 32 Cal. 106, 108; *People v. Johr*, 22 Mich. 461; *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 90 A. D. 575; *Com. v. Dunlop*, 89 Va. 431. Judicial officers, see § 99(d), *infra*.

<sup>74</sup> *Wetherbee v. Dunn*, 32 Cal. 106; *Wood v. Fitz*, 10 Mart. O. S. (La.) 196. Judicial officers, § 99(d), *infra*.

<sup>75</sup> *Yount v. Howell*, 14 Cal. 465; *Jones v. Gale's Curatrix*, 4 Mart. O. S. (La.) 635; *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 90 A. D. 575.

<sup>76</sup> *Scott v. Jackson*, 12 La. Ann. 640; *Fancher v. De Montegre*, 1 Head (Tenn.) 40 (*semble*).

Courts do not, however, take judicial cognizance of the records of land titles in the office of the register of deeds. *Williams v. Langevin*, 40 Minn. 180.

<sup>77</sup> *Anonymous*, 12 Mod. 345; *Yeaton v. Fry*, 5 Cranch (U. S.) 335; *Stoddard v. Sloan*, 65 Iowa, 680, 685; *Porter v. Judson*, 1 Gray (Mass.)

**§ 98. Legislative officers.**

As between two legislatures, each claiming the right to act, the court will take official notice of which is the lawful one.<sup>78</sup> Judicial notice is taken also of the sessions of the legislature, their beginnings and endings,<sup>79</sup> its usual course of proceeding,<sup>80</sup> and the privileges of its members.<sup>81</sup> The doings of the legislative department of the government are also noticed judicially,<sup>82</sup> the most important illustration of this rule being found in the judicial notice of statutes.<sup>83</sup> However, by the weight of authority, transactions on the journals of the legislature are not noticed by the courts without evidence.<sup>84</sup>

**§ 99. Judicial officers—Courts.**

(a) **Existence, seal, jurisdiction, and terms.** The domestic courts will take judicial notice of the existence and local situation of all tribunals created by the constitution and laws of the state,<sup>85</sup> and also of their seals.<sup>86</sup>

175; *Browne v. Philadelphia Bank*, 6 Serg. & R. (Pa.) 484, 9 A. D. 463. Foreign notaries, see § 104, *infra*.

<sup>78</sup> *Opinion of the Justices*, 70 Me. 600, 609.

<sup>79</sup> *Rex v. Wilde*, 1 Lev. 296.

<sup>80</sup> *Lake v. King*, 1 Saund. 131b; *Sims v. Marryat*, 17 Q. B. 281, 292.

<sup>81</sup> *Cassidy v. Stewart*, 2 Man. & G. 437.

<sup>82</sup> *Prince v. Skillin*, 71 Me. 361, 36 A. R. 325.

<sup>83</sup> See § 100(b), *infra*.

<sup>84</sup> *Rex v. Knollys*, 1 Ld. Raym. 10, 15; *Burt v. Winona & St. P. R. Co.*, 31 Minn. 472; *Green v. Weller*, 32 Miss. 650; *State v. Frank*, 61 Neb. 679 (*semble*); *Coleman v. Dobbins*, 8 Ind. 156; *Grob v. Cushman*, 45 Ill. 119. *Contra*, *Moog v. Randolph*, 77 Ala. 597; *State v. Hocker*, 36 Fla. 358.

When the journals are offered in evidence, however, they prove their own authenticity. *Grob v. Cushman*, 45 Ill. 119.

This is not a question whether the journals are available to overthrow an enrolled act.

<sup>85</sup> *Tregany v. Fletcher*, 1 Ld. Raym. 154; *Tucker v. State*, 11 Md. 322; *Com. v. Desmond*, 103 Mass. 445, 447. Judicial districts, see § 95 *supra*.

Every court must take official notice of its own jurisdiction,<sup>87</sup> and of the jurisdiction of all other courts established in the same state by statute.<sup>88</sup> A superior court will take judicial notice of the nature of the jurisdiction of the court whose judgment or decree it is revising.<sup>89</sup>

The dates and duration of the terms of court are noticed judicially;<sup>90</sup> and this is true even where the court in question is inferior to the one in which the cause is being conducted.<sup>91</sup>

(b) **Records.** The courts take judicial notice of their own records.<sup>92</sup> Thus, the trial court will notice all the pleadings, jurisdictional papers, and all proceedings, whether past or pending, in the case on trial.<sup>93</sup> So, the appearance of an attor-

<sup>86</sup> *Tooker v. Beaufort, Sayer*, 297; *Womack v. Dearman*, 7 Port. (Ala.) 513.

<sup>87</sup> *Rogers v. Cady*, 104 Cal. 288, 290, 43 A. S. R. 100, 102.

<sup>88</sup> *Masterson v. Matthews*, 60 Ala. 260.

<sup>89</sup> *Chitty v. Dendy*, 3 Ad. & E. 319, 324; *March v. Com.*, 12 B. Mon. (Ky.) 25, 28; *Donovan v. Ter.*, 3 Wyo. 91.

<sup>90</sup> *Kidder v. Blaisdell*, 45 Me. 461.

<sup>91</sup> *Rodgers v. State*, 50 Ala. 102; *Lindsay v. Williams*, 17 Ala. 229; *State v. Hammett*, 7 Ark. 492; *Boggs v. Clark*, 37 Cal. 236; *Anderson v. Anderson*, 141 Ind. 567, 568; *Lewis v. Wintrobe*, 76 Ind. 13, 16; *State v. Todd*, 72 Mo. 288; *State v. Ray*, 97 N. C. 510, 512; *State v. Toland*, 36 S. C. 515, 523; *Pugh v. State*, 2 Head (Tenn.) 227; *Davidson v. Peticolas*, 34 Tex. 27; *Hancock v. Worcester*, 62 Vt. 106; *Thomas v. Com.*, 90 Va. 92, 94; *Donovan v. Ter.*, 3 Wyo. 91, 93.

The court will judicially notice the time fixed by law for the commencement of the sessions of a defunct court, but not the duration of its sessions. *Gilliland v. Sellers' Adm'rs*, 2 Ohio St. 223.

The courts may take official notice of the time of the commencement of the regular sessions of the county commissioners next after a given date. *Collins v. State*, 58 Ind. 5.

The court will judicially notice the history of a county as to the times and places of holding courts. *Ross v. Austill*, 2 Cal. 183.

<sup>92</sup> *Robinson v. Brown*, 82 Ill. 279; *National Bank v. Bryant*, 13 Bush (Ky.) 419. As to appellate courts, see § 132, *infra*.

<sup>93</sup> *Hollenbach v. Schnabel*, 101 Cal. 312, 40 A. S. R. 57; *State v.*

ney in a cause is known judicially;<sup>94</sup> and, if he renders services in court, that fact will be judicially noticed also.<sup>95</sup>

As a rule, the court does not in a given case take notice of past or pending proceedings in any other case in another court,<sup>96</sup> or even in the same court,<sup>97</sup> without evidence thereof; and this is so even though the other case affects the same subject-matter or the same parties. However, in a prosecution for contempt in disobeying an order issued in a civil action, the court takes judicial notice of the proceedings in that action.<sup>98</sup>

Bowen, 16 Kan. 475; Pagett v. Curtis, 15 La. Ann. 451; State v. Jackson, 106 Mo. 174; Searls v. Knapp, 5 S. D. 325, 49 A. S. R. 873; State v. Bates, 22 Utah, 65, 83 A. S. R. 768.

The filing of a subsequent indictment is a continuation of the same proceeding, and the court may therefore, in the trial of the latter, notice the former. State v. Daugherty, 106 Mo. 182.

The court may take cognizance ex officio that pleadings which are withdrawn have been held insufficient on demurrer. Hoyt v. Beach, 104 Iowa, 257, 65 A. S. R. 461.

A judge may take judicial notice of his own official acts in the case; thus, he knows whether or not he has signed a certificate of evidence. Secrist v. Petty, 109 Ill. 188. But as a rule he may judicially notice only such acts as would properly go upon the record. Dines v. People, 39 Ill. App. 565.

<sup>94</sup> Symmes v. Major, 21 Ind. 443.

<sup>95</sup> Stephenson v. Allison, 123 Ala. 439.

<sup>96</sup> Eyster v. Gaff, 91 U. S. 521; Schuler v. Israel, 120 U. S. 506, 509; Pearson v. Darrington, 32 Ala. 227; Vassault v. Seltz, 31 Cal. 225; Haber v. Klauberg, 3 Mo. App. 342; Kilpatrick v. Kansas City R. Co., 38 Neb. 620, 41 A. S. R. 741. As to appellate courts, see § 132, *infra*.

<sup>97</sup> Stanley v. McElrath, 86 Cal. 449, 10 L. R. A. 545; Lake Merced Water Co. v. Cowles, 31 Cal. 214; Baker v. Mygatt, 14 Iowa, 131; Anderson v. Cecil, 86 Md. 490, 493; State v. Edwards, 19 Mo. 674; Daniel v. Bellamy, 91 N. C. 78; Myers v. State, 46 Ohio St. 473, 15 A. S. R. 638; Grace v. Ballou, 4 S. D. 333; McCormick v. Herndon, 67 Wis. 648. *Contra*, Denny v. State, 144 Ind. 503, 31 L. R. A. 726, 731. As to appellate courts, see § 132, *infra*.

<sup>98</sup> Ex parte Ah Men, 77 Cal. 198, 11 A. S. R. 263. And see Myers v. State, 46 Ohio St. 473, 15 A. S. R. 638. *Contra*, State v. Hudson County

And in the trial of an issue in garnishment proceedings the court will take judicial notice of the existing judgment in the principal action against the defendant therein.<sup>99</sup> And in an action on an attachment bond the court will take official notice of the pendency of an appeal from its order dissolving the attachment.<sup>100</sup> Standing orders of the court, such as an order designating a bank as the court depository, are also judicially noticed in all cases.<sup>101</sup>

If the truth of certain matter be admitted in the pleadings of the parties litigant, or in open court, the court will take judicial notice of the matter, as being upon its own records, and evidence is not only unnecessary to establish the admitted facts, but is ordinarily inadmissible to prove the contrary.<sup>102</sup>

(c) **Practice.** Every court has judicial knowledge of its own practice,<sup>103</sup> including rules prescribed by it in regulation thereof;<sup>104</sup> and of the practice of other courts constituted by the same authority.<sup>105</sup> But a court of review does not take judicial notice of the rules of an inferior court.<sup>106</sup>

*Elec. Co.*, 61 N. J. Law, 114. And see *New Orleans v. Steamship Co.*, 20 Wall. (U. S.) 387.

<sup>99</sup> *Kenosha Stove Co. v. Shedd*, 82 Iowa, 540; *Farrar v. Bates*, 55 Tex. 193.

<sup>100</sup> *Maxwell v. Griffith*, 20 Wash. 106.

<sup>101</sup> *Jones v. Merchants' Nat. Bank*, 33 U. S. App. 703, 35 L. R. A. 698.

<sup>102</sup> See §§ 135, 136, *infra*.

<sup>103</sup> See *Lane's Case*, 2 Coke, 16.

<sup>104</sup> *Davis v. Standish*, 26 Hun (N. Y.) 608.

<sup>105</sup> *Newell v. Newton*, 10 Pick. (Mass.) 470, 472. Judicial notice is taken of the origin, form, and nature of the proceedings of courts of inquest. *State v. Marsh*, 70 Vt. 288.

<sup>106</sup> *Van Sandau v. Turner*, 6 Q. B. 773; *Cutter v. Caruthers*, 48 Cal. 178; *Kindel v. Le Bert*, 23 Colo. 385, 58 A. S. R. 234; *Cornellison v. Foushee*, 19 Ky. L. R. 417, 40 S. W. 680, impliedly overruling *March v. Com.*, 12 B. Mon. (Ky.) 25, 28; *Cherry v. Baker*, 17 Md. 75, and *Scott v. Scott*, 17 Md. 78, impliedly overruling *Contee v. Pratt*, 9 Md. 67, and *Oliver's Ex'rs v. Palmer*, 11 Gill & J. (Md.) 426.

(d) **Officers.** Judicial notice is taken of the existence, appointment, and retirement of judges of courts of record;<sup>107</sup> of the districts to which the individual judges are assigned;<sup>108</sup> and of their discharge of the duties of the office, and recognition as judges by the officers and people of the state.<sup>109</sup> And this is true even where the court in question is inferior to the one in which the cause rests.<sup>110</sup> Accordingly, if a judge of a lower court of general jurisdiction has retired or resigned, the court of review will notice it without evidence.<sup>111</sup>

Justices of the peace are recognized judicially the same as other county officers;<sup>112</sup> and judicial notice is taken also of

<sup>107</sup> *Gilliland v. Seller's Adm'rs*, 2 Ohio St. 223; *Major v. State*, 2 Sneed (Tenn.) 11. *Contra*, *Skipp v. Hooke*, 2 Strange, 1080; *Van Sandau v. Turner*, 6 Q. B. 773, 786 (semble). That a certain person was chief justice of the province at a given time in the past was judicially noticed in *Watson v. Hay*, 3 Kerr (N. B.) 559.

<sup>108</sup> *Walcott v. Wells*, 21 Nev. 47, 54, 37 A. S. R. 478, 483; *Hancock v. Worcester*, 62 Vt. 106.

<sup>109</sup> *Walcott v. Wells*, 21 Nev. 47, 54, 37 A. S. R. 478, 483.

<sup>110</sup> *San Joaquin County v. Budd*, 96 Cal. 47, 51; *Graham v. Anderson*, 42 Ill. 514, 92 A. D. 89; *Russell v. Sargent*, 7 Ill. App. 98; *Ellsworth v. Moore*, 5 Iowa, 486; *Kennedy v. Com.*, 78 Ky. 447; *Ripley v. Warren*, 2 Pick. (Mass.) 592 (quaere); *State v. Ray*, 97 N. C. 510, 512; *Com. v. Fitzpatrick*, 121 Pa. 109, 6 A. S. R. 757, 758; *Kilpatrick v. Com.*, 31 Pa. 198; *Donohoo's Lessee v. Brannon*, 1 Overt. (Tenn.) 327.

However, the appellate court cannot take official notice that certain persons who are sued as individuals are identical with persons of the same names who are the judges of a superior court in the county from which the case comes for review. *San Joaquin County v. Budd*, 96 Cal. 47.

<sup>111</sup> *Ex parte Peterson*, 33 Ala. 74; *People v. Ebanks*, 120 Cal. 626; *People v. McConnell*, 155 Ill. 192.

<sup>112</sup> *Ede v. Johnson*, 15 Cal. 53; *Graham v. Anderson*, 42 Ill. 514, 92 A. D. 89; *Gilbert v. Nat. Cash Register Co.*, 176 Ill. 288; *Hibbs v. Blair*, 14 Pa. 413.

The termination on a certain date, by statute, of the terms of all the justices of the peace in the state, will be taken notice of without evidence. *Stubbs v. State*, 53 Miss. 437.

their signatures.<sup>113</sup> This rule does not, of course, apply to justices of the peace constituted by a state other than that in which the court exercises jurisdiction;<sup>114</sup> nor is it judicially noticed whether or not any justice of the peace resides in a certain city;<sup>115</sup> nor whether a certain justice resides in a particular municipal district or ward.<sup>116</sup>

Every court will take judicial notice of its own officers.<sup>117</sup> Thus, judicial notice is taken of the clerks of the various courts of general jurisdiction throughout the state.<sup>118</sup> And the courts will take notice officially of the attorneys who are licensed to practice therein,<sup>119</sup> and of the prosecuting attorneys.<sup>120</sup> However, a superior court does not take judicial notice of the attorneys who are licensed to practice in an inferior court.<sup>121</sup>

Judicial notice is taken of the signatures and seals of the officers of the court.<sup>122</sup> Thus, the signature of the clerk of

<sup>113</sup> *Ede v. Johnson*, 15 Cal. 53; *Despau v. Swindler*, 3 Mart. (N. S.; La.) 705.

<sup>114</sup> *In re Keeler*, Hempst. 306, Fed. Cas. No. 7,637.

<sup>115</sup> *Koenig v. State*, 33 Tex. Cr. App. 367, 47 A. S. R. 35.

<sup>116</sup> *Allen v. Scharringhausen*, 8 Mo. App. 229.

<sup>117</sup> *Miller v. Matthews*, 87 Md. 464; *Mackinnon v. Barnes*, 66 Barb. (N. Y.) 91, 100. Otherwise as to officers of other courts. *Norvell v. McHenry*, 1 Mich. 227.

<sup>118</sup> *White v. Rankin*, 90 Ala. 541; *Dyer v. Last*, 51 Ill. 179; *Hamman v. Mink*, 99 Ind. 279; *Major v. State*, 2 Sneed (Tenn.) 11; *State v. Cole*, 9 Humph. (Tenn.) 625.

In some states, deputy clerks also are judicially noticed. *Norvell v. McHenry*, 1 Mich. 227.

Judicial notice will not be taken of clerks of inferior courts of limited jurisdiction. *Davis v. McEnaney*, 150 Mass. 451, 452.

<sup>119</sup> *Ferris v. Commercial Nat. Bank*, 158 Ill. 237; *People v. Nevins*, 1 Hill (N. Y.) 154.

The court cannot take notice that a member of the bar has removed from the state. *Sutton v. Chicago, St. P., M. & O. R. Co.*, 98 Wis. 157.

<sup>120</sup> *Major v. State*, 2 Sneed (Tenn.) 11; *People v. Lyman*, 2 Utah, 30.

<sup>121</sup> *Clark v. Morrison* (Ariz.) 52 Pac. 985.

<sup>122</sup> *Alcock v. Whatmore*, 8 Dowl. 615; *Alderson v. Bell*, 9 Cal. 315;

court is judicially noticed;<sup>123</sup> and the same is true of the signature of a member of the bar.<sup>124</sup> Evidence of the correctness of the signature is not needful.

§ 100. Law.

The courts take judicial notice of the law of the forum, including all subsidiary systems that go to make it up, and whether it be found in constitution, statute, or judicial precedent. This is done, not only because the law is a matter of notoriety, but because of the necessity of doing so in order to carry on the administration of justice.<sup>125</sup>

(a) **State and federal law.** The federal constitution is noticed judicially by the federal courts, and also by the courts of the various states of the Union. And the same is true of treaties existing between the United States and foreign nations.<sup>126</sup> Federal law of other source, whether statutory or judge-made, is noticed, not only by the courts of the United States, but also by the several state courts.<sup>127</sup>

*Dyer v. Last*, 51 Ill. 179; *State v. Postlewait*, 14 Iowa, 446; *Mackinnon v. Barnes*, 66 Barb. (N. Y.) 91, 100.

<sup>123</sup> *Bishop v. State*, 30 Ala. 34; *Yell v. Lane*, 41 Ark. 53; *Hammann v. Mink*, 99 Ind. 279; *State v. Cole*, 9 Humph. (Tenn.) 625. The signature of the deputy clerk also is noticed judicially in some states. *Norvell v. McHenry*, 1 Mich. 227.

<sup>124</sup> *Ripley v. Burgess*, 2 Hill (N. Y.) 360. An attorney's signature is judicially noticed only when it is written in the performance of an official act as attorney. *Masterson v. Le Claire*, 4 Minn. 163 (Gil. 108).

The signature of a party to a cause is not noticed judicially. *Alderson v. Bell*, 9 Cal. 315.

<sup>125</sup> *Norman v. Kentucky Board of Managers*, 93 Ky. 537, 18 L. R. A. 556. Thus, the courts of a state will take official notice of its constitution. *Vance v. Farmers' & M. Sav. Bank*, 1 Blackf. (Ind.) 79; *Graves v. Keaton*, 3 Cold. (Tenn.) 8.

<sup>126</sup> See § 107, *infra*, as to treaties.

<sup>127</sup> *Daggett v. Colgan*, 92 Cal. 53, 27 A. S. R. 95, 96; *Semple v. Hagar*, 27 Cal. 163; *Morris v. Davidson*, 49 Ga. 361; *Gooding v. Morgan*, 70



The several state constitutions are judicially noticed by the courts of the respective states,<sup>128</sup> and also by the federal courts. Since the judicial power conferred on the general government by the federal constitution extends to many cases arising under the laws of the individual states, the federal courts take judicial notice, not only of the laws of the United States, but also of the laws of the various states, whether statutory or judge-made; following the construction which has been placed upon the state constitutions and statutes by the highest courts of the state.<sup>129</sup> And this applies, not only to the states comprising the judicial district where the court sits,<sup>130</sup> but to all

Ill. 275; *Dickenson v. Breeden*, 30 Ill. 279; *Buchanan v. Witham*, 36 Ind. 257, 258; *Laidley v. Cummings*, 83 Ky. 606; *Papin v. Ryan*, 32 Mo. 21; *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, 30 A. S. R. 649, 652; *Kessel v. Albetis*, 56 Barb. (N. Y.) 362; *Mims v. Swartz*, 37 Tex. 13; *State v. Bates*, 22 Utah, 65, 83 A. S. R. 768; *Bird v. Com.*, 21 Grat. (Va.) 800.

An act of congress will be judicially noticed by a state court, even though it relates exclusively to the District of Columbia. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.) 1, 63; *Bayly's Adm'r v. Chubb*, 16 Grat. (Va.) 284. Thus, the laws of Maryland having, by act of congress, been continued in force in that part of the District of Columbia which was ceded by that state, they thereby became laws of the United States, of which all courts, state and federal, are bound to take notice. *Bird v. Com.*, 21 Grat. (Va.) 800. Even where state laws are incorporated into an act of congress by mere implication, yet the courts of a sister state will therefore notice them without evidence. *Flanigen v. Washington Ins. Co.*, 7 Pa. 306.

<sup>128</sup> *Vance v. Farmers' & M. Bank*, 1 Blackf. (Ind.) 79; *Graves v. Keaton*, 3 Cold. (Tenn.) 8.

<sup>129</sup> *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152; *Post v. Supervisors*, 105 U. S. 667; *Flash v. Conn*, 109 U. S. 371; *Christy v. Pridgeon*, 4 Wall. (U. S.) 196.

The federal courts will comply with a state statute expressly or impliedly requiring private or special acts to be judicially noticed. See page 401, *infra*.

<sup>130</sup> *U. S. v. Turner*, 11 How. (U. S.) 663.

the other states as well.<sup>131</sup> The law of all the states is judicially noticed by all the federal courts.

(b) **Statutes.** The existence and provisions<sup>132</sup> of general or public statutes prevailing in the state where the court exercises jurisdiction, the time of their taking effect,<sup>133</sup> and the facts which they recite,<sup>134</sup> are noticed by the courts without evidence; and the same is true of the history of legislation in the state with reference to a public matter.<sup>135</sup> Thus, the courts

<sup>131</sup> *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 751; *Hanley v. Donoghue*, 116 U. S. 1, 6; *Owings v. Hull*, 9 Pet. (U. S.) 607, *Thayer, Cas. Ev.* 24; *Gormley v. Bunyan*, 138 U. S. 623; *Elwood v. Flannigan*, 104 U. S. 562; *Lamar v. Micou*, 114 U. S. 218; *Mut. L. Ins. Co. v. Hill*, 97 Fed. 263, 49 L. R. A. 127; *Mut. L. Ins. Co. v. Dingley*, 100 Fed. 408, 49 L. R. A. 132.

This rule does not apply to the laws of the Indian nations, however, and, accordingly, they must be proved. *Wilson v. Owens*, 86 Fed. 571; *Turner v. Fish*, 28 Miss. 306.

The federal courts will take judicial notice of the laws of one of the states of the Confederation before the constitution was adopted. *Loree v. Abner*, 6 U. S. App. 649.

The supreme court of the United States cannot, in reviewing the judgment of a state court, take judicial notice of the law of a sister state, unless the state court took, or might properly have taken, judicial notice thereof. See § 132, *infra*.

<sup>132</sup> *Merchants' Exch. Bank v. McGraw*, 59 Fed. 972; *People v. Hill*, 163 Ill. 186, 36 L. R. A. 634; *Parent v. Walmsly's Adm'r*, 20 Ind. 82; *Hammond's Lessee v. Inloes*, 4 Md. 138; *Stiles v. Stewart*, 12 Wend. (N. Y.) 473, 27 A. D. 142; *People v. Herkimer*, 4 Cow. (N. Y.) 345, 15 A. D. 379; *Horn v. Chicago & N. W. R. Co.*, 38 Wis. 463. The court will take judicial knowledge of the terms of a statute, even though the pleadings purport to set it forth, and misstate its provisions. See note 407, *infra*.

As to the execution and practical construction of a statute by the executive department, see § 97(c), *supra*.

<sup>133</sup> *Heaston v. Cincinnati & F. W. R. Co.*, 16 Ind. 275, 79 A. D. 430; *Pierson v. Baird*, 2 G. Greene (Iowa) 235; *Attorney General v. Foote*, 11 Wis. 14, 78 A. D. 689.

<sup>134</sup> *Rex v. De Berenger*, 3 Maule & S. 67, 69; *Lane v. Harris*, 16 Ga. 217.

<sup>135</sup> *Stout v. Grant County Com'rs*, 107 Ind. 343; *Pierce v. Drew*, 136

take judicial notice of statutes relating to public lands,<sup>136</sup> and, it seems, to weights and measures.<sup>137</sup> And the expiration, suspension, or repeal of a statute will be judicially noticed under the same conditions as would the enactment of the statute.<sup>138</sup>

Private or special acts are not generally noticed by the courts without evidence, but must be proved,<sup>139</sup> since they "are rather exceptions than rules, being those which operate only on particular persons and private concerns."<sup>140</sup>

Mass. 75, 49 A. R. 7, 10; *Harrington v. Providence*, 20 R. I. 233, 38 L. R. A. 305.

<sup>136</sup> *People v. Oakland Water Front Co.*, 118 Cal. 234; *Dickenson v. Breeden*, 30 Ill. 279; *Dolph v. Barney*, 5 Or. 191; *Duren v. Houston & T. C. R. Co.*, 86 Tex. 287; *Houlton v. Chicago, St. P., M. & O. R. Co.*, 86 Wis. 59.

An act of congress granting the right to lay out public highways over the public land will be noticed judicially. *Schwerdtle v. Placer County*, 108 Cal. 589. It has been held that an act for the survey of a particular tract of public land is not, as a rule, such a public statute as the courts are bound to notice judicially. *Allegheny v. Nelson*, 25 Pa. 332.

<sup>137</sup> *Hockin v. Cooke*, 4 Term R. 314; *Mays v. Jennings*, 4 Humph. (Tenn.) 102. In the absence of statute, the courts cannot take judicial notice of a rule for the measurement of corn in the shuck. *South & N. A. R. Co. v. Wood*, 74 Ala. 449.

<sup>138</sup> *Terry v. Merchants' & P. Bank*, 66 Ga. 177; *State v. O'Conner*, 13 La. Ann. 486; *Springfield v. Worcester*, 2 Cush. (Mass.) 52, 61; *Wikel v. Jackson County Com'rs*, 120 N. C. 451.

The repeal of an act of municipal incorporation will be noticed judicially. *Belmont v. Morrill*, 69 Me. 314.

The suspension of the statute of limitations in various states during the Civil War will be noticed judicially. *The Protector*, 12 Wall. (U. S.) 700; *Perkins v. Rogers*, 35 Ind. 124, 9 A. R. 639; *East Tenn. Iron Mfg. Co. v. Gaskell*, 2 Lea (Tenn.) 742, 748; *Caperton v. Martin*, 4 W. Va. 138, 6 A. R. 270.

<sup>139</sup> *Leland v. Wilkinson*, 6 Pet. (U. S.) 317; *Broad St. Hotel Co. v. Weaver's Adm'r*, 57 Ala. 26; *Perdicaris v. Trenton City Bridge Co.*, 29 N. J. Law, 367; *Halles v. State*, 9 Tex. App. 170; *Horn v. Chicago & N. W. R. Co.*, 38 Wis. 463. This rule has been changed by statute in some states. See page 400, *infra*.

<sup>140</sup> 1 Bl. Comm. 86.

A public act will be noticed judicially, even though it is passed in amendment of a private one.<sup>141</sup> And amendments or supplements of a public act will be judicially noticed, even though made by private or special act.<sup>142</sup>

If a pre-existing public statute is incorporated into an otherwise private act, either expressly or by direct reference, the latter thereby becomes a public act, and will be judicially noticed as such.<sup>143</sup> So, a new provision may be noticed without evidence, if general or public, even though it be embodied in an otherwise private act;<sup>144</sup> as where a corporate charter authorizes the company to become sole surety in all cases where two or more sureties are otherwise required by law, and further authorizes the courts to approve a bond so made.<sup>145</sup>

A statute may be restricted in its operation to a specified locality less than all the state, and yet be public, if it applies generally to all persons in that locality.<sup>146</sup> It is upon this principle that statutes incorporating particular municipal corporations are recognized by the courts without evidence.<sup>147</sup>

<sup>141</sup> *Lavalle v. People*, 6 Ill. App. 157.

<sup>142</sup> *Unity v. Burrage*, 103 U. S. 447; *Jemison v. Planters' & M. Bank*, 17 Ala. 754; *Castello v. Landwehr*, 28 Wis. 522. See *Belmont v. Morrill*, 69 Me. 314, 317; *Miller v. Matthews*, 87 Md. 464.

<sup>143</sup> *Hooker v. Greene*, 50 Wis. 271.

<sup>144</sup> *Newberry Bank v. Greenville & C. R. Co.*, 9 Rich. Law (S. C.) 495; *Wright v. Hawkins*, 28 Tex. 452, 471.

<sup>145</sup> *Miller v. Matthews*, 87 Md. 464.

<sup>146</sup> *Unity v. Burrage*, 103 U. S. 447, 454; *Bevens v. Baxter*, 23 Ark. 387; *Levy v. State*, 6 Ind. 281; *Covington v. Hoadley*, 83 Ky. 444; *State v. Jackson*, 39 Me. 291; *Hammond's Lessee v. Inloes*, 4 Md. 139; *Burnham v. Webster*, 5 Mass. 266; *Bretz v. N. Y.*, 6 Rob. (N. Y.) 325; *State v. Cooper*, 101 N. C. 684, 688; *Meshke v. Van Doren*, 16 Wis. 319.

<sup>147</sup> *Albrittin v. Huntsville*, 60 Ala. 486, 31 A. R. 46, 48; *Arndt v. Cullman*, 132 Ala. 540, 90 A. S. R. 922; *People v. Potter*, 35 Cal. 110; *Macey v. Titcombe*, 19 Ind. 135; *Stier v. Oskaloosa*, 41 Iowa, 353; *Prell v. McDonald*, 7 Kan. 426, 12 A. R. 423; *Ex parte Wygant*, 39 Or. 429, 87 A. S. R. 673; *State v. Murfreesboro*, 11 Humph. (Tenn.) 216;

General incorporation laws, municipal and otherwise, being public acts, are of course noticed by the courts without evidence;<sup>148</sup> but judicial cognizance is not taken of whether a particular company or a particular body of people have taken advantage of such laws.<sup>149</sup> Nor, as a rule, can the court take judicial notice of charters specially granted by the legislature to private corporations.<sup>150</sup> This latter rule is subject in some states to two exceptions. Acts incorporating banks<sup>151</sup> and

*Winooski v. Gokey*, 49 Vt. 282; *Duncan v. Lynchburg* (Va.) 48 L. R. A. 331; *Beasley v. Beckley*, 28 W. Va. 81; *Terry v. Milwaukee*, 15 Wis. 490. *Contra*, *Butler v. Robinson*, 75 Mo. 192.

The same is true of a statute recognizing, though not incorporating, a municipal corporation. *Swain v. Comstock*, 18 Wis. 463.

Street improvement acts relating to the city and county of San Francisco are noticed judicially by the supreme court of California. *Conlin v. Board of Sup'rs*, 99 Cal. 17, 37 A. S. R. 17.

<sup>148</sup> *Washington v. Finley*, 10 Ark. 423; *Braceville Coal Co. v. People*, 147 Ill. 66, 72, 37 A. S. R. 206, 210; *Heaston v. Cincinnati & F. W. R. Co.*, 16 Ind. 275, 79 A. D. 430; *Portsmouth Livery Co. v. Watson*, 10 Mass. 91; *Hopkins v. Kan. City, St. J. & C. B. R. Co.*, 79 Mo. 98.

Judicial notice of special charters and general laws of incorporation, see, also, 1 Clark & M. Priv. Corp. § 65.

<sup>149</sup> *Danville & W. L. P. Co. v. State*, 16 Ind. 456; *Johnson v. Indianapolis Common Council*, 16 Ind. 227; *Hard v. Decorah*, 43 Iowa, 313; *Hopkins v. Kansas City, St. J. & C. B. R. Co.*, 79 Mo. 98; *Temple v. State*, 15 Tex. App. 304, 49 A. R. 200; *Koenig v. State*, 33 Tex. Cr. App. 367, 47 A. S. R. 35. *Contra*, by statute, *Jones v. Lake View*, 151 Ill. 663; *Doyle v. Bradford*, 90 Ill. 416; *Bessette v. People*, 193 Ill. 334, 56 L. R. A. 558.

<sup>150</sup> *Portsmouth Livery Co. v. Watson*, 10 Mass. 91. And see the two notes following. *Contra*, *Jackson v. State*, 72 Ga. 28. All acts of incorporation are declared by statute to be public, in some states, and they are accordingly judicially noticed as such. *Durham v. Daniels*, 2 G. Greene (Iowa) 518; *State v. McAllister*, 24 Me. 139.

<sup>151</sup> *Crawford v. Planters' & M. Bank*, 6 Ala. 289; *Gordon v. Montgomery*, 19 Ind. 110; *Bank of Com. v. Spilman*, 3 Dana (Ky.) 150; *Utica Bank v. Smedes*, 3 Cow. (N. Y.) 662, 684 (semble); *Smith v. Strong*, 2 Hill (N. Y.) 241 (semble); *Newberry Bank v. Greenville & C. R. Co.*, 9 Rich. Law (S. C.) 495; *Shaw v. State*, 3 Sneed (Tenn.) 86; *Hays v. Northwestern Bank*, 9 Grat. (Va.) 127. And see *Jones v. Fales*,

acts incorporating railroad companies<sup>152</sup> are regarded as public by some courts, and are therefore judicially noticed.

If the legislature declares that the act shall be deemed a public one, though it is otherwise not so, the courts will take judicial notice of it;<sup>153</sup> and of course the courts will comply with a statutory direction that all private acts shall be judicially noticed without proof.<sup>154</sup> This rule, though prescribed by a state legislature, governs federal courts sitting in that state.<sup>155</sup>

In closing the discussion of public and private acts, it may be said that the disposition in America has been, on the whole, to enlarge the limits of public acts, and to bring within the definition all enactments of a general character or which in any way affect the community at large.<sup>156</sup>

4 Mass. 245, 252. *Contra*, as to private banking corporations, *Workingmen's Bank v. Converse*, 33 La. Ann. 963; *First Nat. Bank v. Gruber*, 87 Pa. 468, 30 A. R. 378. The statutes authorize bank charters to be judicially noticed in some states. *Davis v. Fulton Bank*, 31 Ga. 69; *Buell v. Warner*, 33 Vt. 570, 578.

<sup>152</sup> *Western & A. R. Co. v. Roberson*, 61 Fed. 592; *Wright v. Hawkins*, 28 Tex. 452, 471; *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336. *Contra*, *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413, 28 A. R. 740, 750; *Ohio & I. R. Co. v. Ridge*, 5 Blackf. (Ind.) 78; *Atchison, T. & S. F. R. Co. v. Blackshire*, 10 Kan. 477. In some states it is provided by statute, either directly or indirectly, that railroad charters may be judicially noticed. *Hall v. Brown*, 58 N. H. 93.

<sup>153</sup> *Hammett v. Little Rock & N. R. Co.*, 20 Ark. 204, 208; *Cincinnati, H. & I. R. Co. v. Clifford*, 113 Ind. 460; *Bowie v. Kansas City*, 51 Mo. 454; *Storrie v. Cortes*, 90 Tex. 283, 35 L. R. A. 666; *Clark v. Janesville*, 10 Wis. 135, 182. And see notes 150-152, *supra*. See, however, *Cox v. St. Louis*, 11 Mo. 431, 432; *Pettit v. May*, 34 Wis. 666, 674.

<sup>154</sup> *People v. Hagar*, 52 Cal. 171; *Collier v. Baptist Education Soc.*, 8 B. Mon. (Ky.) 68; *Bixler's Adm'x v. Parker*, 3 Bush (Ky.) 166; *Beaumont v. Mountain*, 10 Bing. 404.

<sup>155</sup> *Beaty v. Knowler's Lessee*, 4 Pet. (U. S.) 152; *Junction R. Co. v. Ashland Bank*, 12 Wall. (U. S.) 226; *Case v. Kelly*, 133 U. S. 21; *Unity v. Burrage*, 103 U. S. 447; *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227.

<sup>156</sup> *Unity v. Burrage*, 103 U. S. 447, 455.

Hammon, Ev.—26.

(c) **Administrative rules.** Administrative rules and regulations, unless prescribed by high officials, are not taken notice of by the courts without evidence.<sup>157</sup> Thus, the federal courts will not take official notice of the rules of the board of supervising inspectors of steam vessels.<sup>158</sup> However, if congress expressly intrusts to either of the principal departments of the government power to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect of which the public has a right to participate, and by which it is to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice.<sup>159</sup> And certain other rules and regulations prescribed by high officials under authority are also noticed judicially.<sup>160</sup>

(d) **Municipal resolutions and ordinances.** The ordinances and resolutions of municipal boards and councils are not noticed judicially,<sup>161</sup> except by courts of the municipality,<sup>162</sup> or on appeal from such courts.<sup>163</sup>

<sup>157</sup> *Hensley v. Tarpey*, 7 Cal. 288; *Com. v. Crane*, 158 Mass. 218; *Palmer v. Aldridge*, 16 Barb. (N. Y.) 131.

<sup>158</sup> *The E. A. Packer*, 140 U. S. 360, 367; *The Clara*, 14 U. S. App. 346, 350, 5 C. C. A. 390.

<sup>159</sup> *Caha v. U. S.*, 152 U. S. 211.

<sup>160</sup> *Smith v. Shakopee*, 103 Fed. 240, 44 C. C. A. 1; *Dominici v. U. S.*, 72 Fed. 46; *Low v. Hanson*, 72 Me. 104; *Campbell v. Wood*, 116 Mo. 196; *U. S. v. Williams*, 6 Mont. 379.

<sup>161</sup> *Case v. Mobile*, 30 Ala. 538; *Furhman v. Huntsville*, 54 Ala. 263; *Lucas v. San Francisco*, 7 Cal. 463, 474; *Green v. Indianapolis*, 22 Ind. 192; *Indianapolis & C. R. Co. v. Caldwell*, 9 Ind. 397; *Garvin v. Wells*, 8 Iowa, 286; *Lucker v. Com.*, 4 Bush (Ky.) 440; *New Orleans v. Labatt*, 33 La. Ann. 107; *Shanfelter v. Baltimore*, 80 Md. 483, 27 L. R. A. 648; *Mooney v. Kennett*, 19 Mo. 551, 61 A. D. 576; *Porter v. Waring*, 69 N. Y. 250; *Wilson v. State*, 16 Tex. App. 497; *Stittgen v. Rundle*, 99 Wis. 78.

Moreover, it has been held that a statutory provision that the ordinances of municipal corporations shall be received in evidence in

(e) **Common law.** The courts take judicial notice of the common law, as distinguished from the law established by constitution and statute. Accordingly, judicial cognizance is taken of the rules of the common law in the strict sense of the term,<sup>164</sup> and of the rules of equity law;<sup>165</sup> the rules of admiralty<sup>166</sup> and ecclesiastical law;<sup>167</sup> and such customs and usages as have become a part of the common law.<sup>168</sup> And this rule applies to federal as well as to state courts.<sup>169</sup>

(f) **Customs and usages.** Judicial notice is taken of those customs and usages which have become a part of the common law, as we have just seen. An important illustration of this is found in the law merchant. This consists of judicially recognized customs and usages of merchants, mainly with refer-

all courts without further proof does not enable the court to take judicial notice of a particular ordinance unless it is produced on the trial. *Winona v. Burke*, 23 Minn. 254; *Cox v. St. Louis*, 11 Mo. 431. And see *Pettit v. May*, 34 Wis. 666, 674.

<sup>162</sup> *State v. Leiber*, 11 Iowa, 407; *Downing v. Miltonvale*, 36 Kan. 740; *Anderson v. O'Donnell*, 29 S. C. 355, 13 A. S. R. 728. In Minnesota, it seems, even the municipal courts do not take notice of the ordinances of their respective municipalities. *Winona v. Burke*, 23 Minn. 254.

<sup>163</sup> See § 132, *infra*.

<sup>164</sup> *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 A. R. 176; *Owen v. Boyle*, 15 Me. 147, 32 A. D. 143; *Wilson v. Bumstead*, 12 Neb. 1, 4; *Swain v. Comstock*, 18 Wis. 463.

<sup>165</sup> *Maberley v. Robins*, 5 Taunt. 625; *Sims v. Marryat*, 17 Q. B. 281, 292; *Doe d. Williams v. Lloyd*, 1 Man. & G. 671, 685; *Neeves v. Burrage*, 14 Q. B. 504; *Westoby v. Day*, 2 El. & Bl. 605, 624.

<sup>166</sup> *Chandler v. Grieves*, 2 H. Bl. 606, note. And see *The Scotia*, 14 Wall. (U. S.) 170.

<sup>167</sup> *Sims v. Marryat*, 17 Q. B. 281, 292. It is otherwise in the United States as to ecclesiastical law. *Youngs v. Ransom*, 31 Barb. (N. Y.) 49.

<sup>168</sup> *Munn v. Burch*, 25 Ill. 35; *Power v. Bowdle*, 3 N. D. 107, 44 A. S. R. 511; *Isaacs v. Barber*, 10 Wash. 124, 128, 45 A. S. R. 772, 775. See § 100(f), *infra*.

<sup>169</sup> *Pennington v. Gibson*, 16 How. (U. S.) 65, 81; *Hinde v. Vattier's Lessee*, 5 Pet. (U. S.) 398.



ence to negotiable instruments.<sup>170</sup> Banking customs and usages, and various other established customs and usages of merchants, are also noticed by the courts without evidence.<sup>171</sup> And the same is true, it seems, of marine customs,<sup>172</sup> of "the law of the road;"<sup>173</sup> of the usual practice and course of conveyancing;<sup>174</sup> and of the public fasts, festivals, and holidays.<sup>175</sup>

Strictly speaking, a custom or usage, to be noticed judicially, must be general and of such long standing as to have become a part of the law itself;<sup>176</sup> and, as a rule, customs that are limited to a particular locality, or to a special class of people or a special business, are not judicially noticed, and must therefore be established by evidence.<sup>177</sup> However, many usages and

<sup>170</sup> *Ereskine v. Murray*, 2 *Ld. Raym.* 1542; *Edie v. East India Co.*, 2 *Burrow*, 1216, 1226, 1228; *Jewell v. Center*, 25 *Ala.* 498; *Reed v. Wilson*, 41 *N. J. Law*, 29; *Fleming v. McClure*, 1 *Brev. (S. C.)* 428, 2 *A. D.* 671.

<sup>171</sup> *Ford v. Hopkins*, 1 *Salk.* 283; *Cameron v. Blackman*, 39 *Mich.* 108; *Watt v. Hoch*, 25 *Pa.* 411. Banking customs and usages, see § 121, *infra*. Railroad customs and usages, see § 119, *infra*.

<sup>172</sup> *The Scotia*, 14 *Wall. (U. S.)* 170. And see *Chandler v. Grieves*, 2 *H. Bl.* 606, note; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 *U. S.* 397.

Judicial notice is taken that the books of general record known as "The American Lloyds," "The Green Book," and "The Record Book" are referred to by business men for the purpose of ascertaining the condition, capacity, age, and value of ships. *Slocovich v. Orient M. Ins. Co.*, 108 *N. Y.* 56.

<sup>173</sup> *Turley v. Thomas*, 8 *Car. & P.* 103; *Leame v. Bray*, 3 *East*, 593.

<sup>174</sup> 3 *Sugden, Vend. & Pur.* 28; *Willoughby v. Willoughby*, 1 *Term R.* 763, 771; *Rowe v. Grenfel*, *Ryan & M.* 396, 398.

<sup>175</sup> *Harvy v. Broad*, 2 *Salk.* 626; *Sasscer v. Farmers' Bank*, 4 *Md.* 409; *Aron v. Wausau*, 98 *Wis.* 592, 40 *L. R. A.* 733.

<sup>176</sup> *City Elec. St. R. Co. v. First Nat. Exch. Bank*, 62 *Ark.* 33, 54 *A. S. R.* 282. Customs must be proved till they come, by degrees, to be judicially noticed. *Ex parte Powell*, 1 *Ch. Div.* 501, 507.

<sup>177</sup> *Argyle v. Hunt*, 1 *Strange*, 187; *Goldsmith v. Sawyer*, 46 *Cal.* 209; *Turner v. Fish*, 28 *Miss.* 306; *Power v. Bowdle*, 3 *N. D.* 107, 44 *A. S. R.* 511; *Lewis v. McClure*, 8 *Or.* 273; *Horn v. Chicago & N. W. R. Co.*, 38 *Wis.* 463. *Contra*, *Watt v. Hoch*, 25 *Pa.* 411 (*semble*).

customs that are not such in the strict sense of the words will often be noticed judicially because of their notoriety.<sup>178</sup> Thus, some usages relating to mines and mining are judicially noticed,<sup>179</sup> although judicial cognizance is not taken of those voluntary regulations peculiar to mining camps and known as "miners' laws."<sup>180</sup> So judicial notice is taken of the modern methods of carrying on trade as compared with those formerly existing;<sup>181</sup> of the nature of commercial agencies and the conduct of their business;<sup>182</sup> of the way in which insurance is usually effected,<sup>183</sup> and of whether a vacancy in the occupation of a building increases the risk of fire;<sup>184</sup> of the storing of wheat in mass with other wheat of the same grade and quality in general commercial elevators;<sup>185</sup> and of the nature and common methods of the business of conducting lotteries.<sup>186</sup>

<sup>178</sup> *Fox v. Hale & N. S. Min. Co.*, 108 Cal. 369; *State v. Chingren*, 105 Iowa, 169. Customs and usages as to banks and banking, see § 121, *infra*; as to railroads, see § 119, *infra*.

It is judicially known that real property is customarily assessed for general taxation at less than its actual value. *Railroad & T. Co. v. Board of Equalizers*, 85 Fed. 302, 308.

The custom of the federal government with respect to allowing the unsurveyed public lands to be used for pasturage is noticed judicially. *Mathews v. Great Northern R. Co.*, 7 N. D. 81.

<sup>179</sup> *Rowe v. Grenfel, Ryan & M.* 396, 398; *Clifton Iron Co. v. Dye*, 87 Ala. 468; *Adams Min. Co. v. Senter*, 26 Mich. 73; *Isaacs v. Barber*, 10 Wash. 124, 45 A. S. R. 772.

<sup>180</sup> *Sullivan v. Hense*, 2 Colo. 424.

<sup>181</sup> *Gregory v. Wendell*, 39 Mich. 337, 33 A. R. 390, 392; *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 5 Mo. App. 347.

<sup>182</sup> *Holmes v. Harrington*, 20 Mo. App. 661; *Eaton, Cole & Burnham Co. v. Avery*, 83 N. Y. 31.

<sup>183</sup> *North American Fire Ins. Co. v. Throop*, 22 Mich. 146, 7 A. R. 638, 646.

<sup>184</sup> *White v. Phoenix Ins. Co.*, 83 Me. 279; *Luce v. Dorchester Mut. Fire Ins. Co.*, 105 Mass. 297, 7 A. R. 522.

<sup>185</sup> *Davis v. Kobe*, 36 Minn. 214 1 A. S. R. 663.

<sup>186</sup> *Saloman v. State*, 28 Ala. 83; *Lohman v. State*, 81 Ind. 15.

**§ 101. Miscellaneous matters.**

(a) **Currency.** The court will take judicial notice of the current coins of the country;<sup>187</sup> and they assume knowledge also of the character of the existing circulating medium, and the popular language in reference to it.<sup>188</sup> The character of the circulating medium of the state at a given time in the past will also be judicially noticed as a matter of history or of statute;<sup>189</sup> but the courts will not notice the current value of the currency at any given time,<sup>190</sup> except in a general way,<sup>191</sup> though they will take cognizance that bills which are a part of the currency of the United States are prima facie of a commercial value equal to that imported by their face.<sup>192</sup> The financial history of the country will be officially noticed by the courts;<sup>193</sup> and the character and history of the Confederate currency is also noticed judicially.<sup>194</sup> The value of foreign currency is not noticed judicially,<sup>195</sup> except as fixed by domestic statute.<sup>196</sup>

<sup>187</sup> *U. S. v. Burns*, 5 McLean, 23, Fed. Cas. No. 14,691.

<sup>188</sup> *U. S. v. 4000 American Gold Coin*, Woolw. 217, Fed. Cas. No. 14,439; *Hart v. State*, 55 Ind. 599; *Jones v. Overstreet*, 4 T. B. Mon. (Ky.) 547, 550; *Johnston v. Hedden*, 2 Johns. Cas. (N. Y.) 274; *Shaw v. State*, 3 Sneed (Tenn.) 86.

<sup>189</sup> *Lampton v. Haggard*, 3 T. B. Mon. (Ky.) 149. As to Confederate currency, see note 194, *infra*.

<sup>190</sup> *Modawell v. Holmes*, 40 Ala. 391; *Feemster v. Ringo*, 5 T. B. Mon. (Ky.) 336.

<sup>191</sup> *Bryant v. Foot*, L. R. 3 Q. B. 497, 37 L. J. Q. B. 217.

<sup>192</sup> *Gady v. State*, 83 Ala. 51.

<sup>193</sup> *Ashley's Adm'x v. Martin*, 50 Ala. 537.

<sup>194</sup> *Keppel's Adm'rs v. Petersberg R. Co.*, Chase, 167, Fed. Cas. No. 7,722; *Buford v. Tucker*, 44 Ala. 89; *Lumpkin v. Murrell*, 46 Tex. 51; *Simmons v. Trumbo*, 9 W. Va. 358. See, however, *Modawell v. Holmes*, 40 Ala. 391.

<sup>195</sup> *Kermott v. Ayer*, 11 Mich. 181. See, however, *Johnston v. Hedden*, 2 Johns. Cas. (N. Y.) 274.

<sup>196</sup> *U. S. v. Burns*, 5 McLean, 23, Fed. Cas. No. 14,691.

The courts will not take judicial notice of current rates of exchange between commercial points.<sup>197</sup> Nor are foreign rates of interest known, in the absence of evidence.<sup>198</sup>

(b) **Post.** Various matters relating to the post are within the judicial knowledge of the court.<sup>199</sup> Thus, the location of the various post offices in the jurisdiction wherein the court sits will be judicially noticed.<sup>200</sup> So, the court will take judicial notice of the general certainty that matter carried through the mails will, in spite of much imperfection of the address, reach its proper destination;<sup>201</sup> and also in a general way of the ordinary course of the mails as to time.<sup>202</sup>

(c) **Census.** The courts take judicial notice of the facts shown by the official census, state or federal. Thus, the population of the country, and its various states and cities, as shown by the official census, is noticed judicially;<sup>203</sup> and also the time ordinarily required to complete the enumeration of a state.<sup>204</sup>

(d) **Elections.** Judicial notice is taken of the days of gen-

<sup>197</sup> *Lowe v. Bliss*, 24 Ill. 168, 76 A. D. 742.

<sup>198</sup> *Insurance Co. v. Forcheimer*, 86 Ala. 541; *Holley v. Holley*, Litt. Sel. Cas. 505, 12 A. D. 342; *Kermott v. Ayer*, 11 Mich. 181; *Millard v. Truax*, 73 Mich. 381; *Ramsay v. McCauley*, 2 Tex. 189. This is an illustration of the rule that judicial notice is not taken of foreign laws. See § 105, *infra*.

<sup>199</sup> Courts are bound to take judicial notice of the course of post, of the stamps of post offices upon letters, and of the character of a post card as to visibility of the message. Per Palles, C. B., in *Robinson v. Jones*, 4 L. R. Ir. 391, 395.

<sup>200</sup> *Smitha v. Flournoy's Adm'r*, 47 Ala. 345.

<sup>201</sup> *Gamble v. Central R. & B. Co.*, 80 Ga. 595, 12 A. S. R. 276, 280.

<sup>202</sup> *National Masonic Acc. Ass'n v. Seed*, 95 Ill. App. 43.

<sup>203</sup> *People v. Williams*, 64 Cal. 87; *Worcester Nat. Bank v. Cheney*, 94 Ill. 430; *Denny v. State*, 144 Ind. 503, 31 L. R. A. 726; *Parker v. State*, 133 Ind. 178, 18 L. R. A. 567; *Bennett v. Marion*, 106 Iowa, 628; *State v. Braskamp*, 87 Iowa, 588, 592; *State v. Marion County Court*, 128 Mo. 427; *State v. Jackson County Court*, 89 Mo. 237; *Kokes v. State*, 55 Neb. 691; *State v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561.

<sup>204</sup> *People v. Rice*, 135 N. Y. 473, 16 L. R. A. 836.

eral political elections,<sup>205</sup> and of some other statutory elections;<sup>206</sup> and also, under some circumstances, of the offices then to be filled,<sup>207</sup> of the tickets there presented,<sup>208</sup> and of the result of the canvass.<sup>209</sup> Courts may notice ex officio the former qualifications of voters as a matter of legal history;<sup>210</sup> and the powers of municipal corporations with reference to electing officers are judicially noticed;<sup>211</sup> also that primary elections have grown to be an essential part of our political system.<sup>212</sup>

#### B. FOREIGN GOVERNMENT.

#### § 102. Existence, title, and extent.

Every sovereign state recognizes, and its tribunals therefore take judicial notice of, the existence and titles of all the other sovereign powers in the civilized world,<sup>213</sup> and their territorial extent.<sup>214</sup> Thus, it was judicially noticed, in 1884, that the island of Cuba was a dependency of the kingdom of Spain;<sup>215</sup>

<sup>205</sup> *Urmston v. State*, 73 Ind. 175; *State v. Minnick*, 15 Iowa, 123; *Ellis v. Reddin*, 12 Kan. 306; *Jackson County v. Arnold*, 135 Mo. 207; *Kokes v. State*, 55 Neb. 691.

<sup>206</sup> *Wampler v. State*, 148 Ind. 557, 38 L. R. A. 829; *In re Denny*, 156 Ind. 104, 51 L. R. A. 722; *Prince v. Crocker*, 166 Mass. 347, 32 L. R. A. 610.

<sup>207</sup> *U. S. v. Morrissey*, 32 Fed. 147; *State v. Minnick*, 15 Iowa, 123; *Ellis v. Reddin*, 12 Kan. 306.

<sup>208</sup> *State v. Downs*, 148 Ind. 324.

<sup>209</sup> *In re Denny*, 156 Ind. 104, 51 L. R. A. 722; *Prince v. Crocker*, 166 Mass. 347, 32 L. R. A. 610; *Kokes v. State*, 55 Neb. 691; *Thomas v. Com.*, 90 Va. 92.

<sup>210</sup> *Rasmussen v. Baker*, 7 Wyo. 117, 38 L. R. A. 773.

<sup>211</sup> *Gallagher v. State*, 10 Tex. App. 469.

<sup>212</sup> *State v. Hirsch*, 125 Ind. 207, 9 L. R. A. 170.

<sup>213</sup> *U. S. v. Wagner*, 2 Ch. App. 582, 585; *Jones v. U. S.*, 137 U. S. 202, 214; *The Santissima Trinidad*, 7 Wheat. (U. S.) 283; *Lazier v. Westcott*, 26 N. Y. 146, 82 A. D. 404.

<sup>214</sup> *Foster v. Globe Venture Syndicate*, 69 Law J. Ch. 375, [1900] 1 Ch. 811, 82 Law T. (N. S.) 253; *Gilbert v. Moline W. P. & Mfg. Co.*, 19 Iowa, 319.

and the organization of Canada as part of the British Empire has also been noticed judicially.<sup>216</sup> It should be observed that the judiciary follows the executive in this matter, and cannot take notice of the existence of a newly formed government which the executive has not recognized, nor refuse to take notice of a government which has been recognized by the executive.<sup>217</sup> A common illustration of this occurs where a part of a foreign country separates itself from the rest, and establishes for itself an independent government. The courts of no other nation can recognize the new government until it has been acknowledged by the sovereign power under which the tribunal exists.<sup>218</sup> And the same rule will be applied in taking notice of the territorial extent of a recognized state.<sup>219</sup>

### § 103. Flag and seal.

The usual symbols of nationality and sovereignty are the national flag and seal. Every sovereign recognizes, therefore,

<sup>215</sup> *People v. D'Argencour*, 32 Hun (N. Y.) 178.

<sup>216</sup> *Ex parte Lane*, 6 Fed. 34; *Calhoun v. Ross*, 60 Ill. App. 309; *Lazier v. Westcott*, 26 N. Y. 146, 82 A. D. 404.

<sup>217</sup> *Mighell v. Sultan of Johore* [1894] 1 Q. B. 149, 9 Rep. 447, 63 Law J. Q. B. 593, 70 Law T. (N. S.) 64; *Yrisarri v. Clement*, 2 Car. & P. 223; *Berne v. Bank of England*, 9 Ves. 347; *Jones v. U. S.*, 137 U. S. 202, 212, 214; *U. S. v. Palmer*, 3 Wheat. (U. S.) 610; *Underhill v. Hernandez*, 168 U. S. 250. See *Dolder v. Bank of England*, 10 Ves. 352.

<sup>218</sup> *Taylor v. Barclay*, 2 Sim. 213, Thayer, Cas. Ev. 23; *Thompson v. Powles*, 2 Sim. 194; *Rose v. Himely*, 4 Cranch (U. S.) 241, 272; *The Nueva Anna*, 6 Wheat. (U. S.) 193; *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246; *Kennett v. Chambers*, 14 How. (U. S.) 38.

If, however, the domestic government, while remaining neutral, recognizes the existence of civil war in a foreign state, the domestic courts cannot consider as criminal individual acts of hostility authorized by war and directed against the old government by the new. *U. S. v. Palmer*, 3 Wheat. (U. S.) 610.

<sup>219</sup> *Foster v. Globe Venture Syndicate*, 69 Law J. Ch. 375, [1900] 1 Ch. 811, 82 Law T. (N. S.) 253; *Williams v. Suffolk Ins. Co.*, 13 Pet. (U. S.) 415.

and its tribunals accordingly take official notice of, the flags and seals of all the other sovereign powers in the civilized world.<sup>220</sup> This rule is subject to the qualification noted in the preceding section as to the judiciary following the executive. If, therefore, a foreign state has not been recognized by the sovereign power under which the tribunal is established, its flag and seal are not judicially known to the domestic courts.<sup>221</sup>

§ 104. Officers and courts.

As a rule, judicial notice is not assumed of the officers of a foreign government, unless they have been recognized in their official capacity by the executive branch of the domestic government; and a sister state is a foreign government, within the meaning of this rule.<sup>222</sup> As just intimated, the rule seems to be otherwise in reference to foreign ministers accredited to the domestic government and recognized by the executive.<sup>223</sup> And an exception to the rule exists in the case of notaries public, so far as concerns their powers and duties under the law merchant; that is to say, so far as concerns the protest by them of foreign bills. Accordingly, if a foreign certificate of protest is authenticated by the notary's official seal, it is *prima facie* evidence of the facts recited in it, and is received

<sup>220</sup> 1 Greenl. Ev. § 4; Anon., 9 Mod. 66; *U. S. v. Johns*, 4 Dall. (U. S.) 412; *Griswold v. Pitcairn*, 2 Conn. 85; *Slimms v. Southern Exp. Co.*, 38 Ga. 129; *Robinson v. Gilman*, 20 Me. 299; *Lincoln v. Battelle*, 6 Wend. (U. S.) 475; *Coit v. Millikin*, 1 Denio (N. Y.) 376.

<sup>221</sup> *The Estrella*, 4 Wheat. (U. S.) 298; *U. S. v. Hutchings*, 2 Wheeler, Cr. Cas. (U. S.) 543; *The Nueva Anna*, 6 Wheat. (U. S.) 193; *U. S. v. Palmer*, 3 Wheat. (U. S.) 610.

<sup>222</sup> *Fellows v. Menasha*, 11 Wis. 558. And see *In re Keeler*, Hemp. 306, Fed. Cas. No. 7,637. See, however, § 105(b), *infra*.

<sup>223</sup> *Walden v. Canfield*, 2 Rob. (La.) 466. And see *In re Balz*, 135 U. S. 403.

in evidence by the courts of all civilized countries without further proof.<sup>224</sup>

Judicial notice is taken that courts are established in the individual United States and in Canada for the administration of justice;<sup>225</sup> and foreign admiralty and maritime courts, being courts of the civilized world, and of co-ordinate jurisdiction, are judicially recognized everywhere by common consent and general usage. Their sentences are conclusive and their seals need not be proved.<sup>226</sup> This last rule does not apply to other courts of foreign countries, and accordingly judicial notice is not taken of their seals by the domestic courts.<sup>227</sup>

#### § 105. Laws.

(a) **General rules.** The laws of a foreign state, whether constitutional, statutory, or customary, are regarded as matter of fact. Their provisions are enforced by domestic tribunals, not because they are laws in the strict sense, but because transactions occurring where they obtain are presumed to have oc-

<sup>224</sup> Anonymous, 12 Mod. 345; *Chesmer v. Noyes*, 4 Camp. 129, 130 (semble); *Pierce v. Indseth*, 106 U. S. 546; *Carter v. Burley*, 9 N. H. 558; *Delafeld v. Hand*, 3 Johns. (N. Y.) 310, 314; *Second Nat. Bank v. Chancellor*, 9 W. Va. 69, 70. See *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173.

Some other acts of foreign notaries have been judicially recognized in the domestic courts. *Denmead v. Maack*, 2 MacArthur (D. C.) 475; *Las Caygas v. Larionda's Syndics*, 4 Mart. (La.) 283. But the domestic courts cannot take notice ex officio of whether the notaries of a sister state have power to take affidavits. *Teutonia Loan & B. Co. v. Turrell*, 19 Ind. App. 469, 65 A. S. R. 419.

<sup>225</sup> *Dozier v. Joyce*, 8 Port. (Ala.) 303; *Lazier v. Westcott*, 26 N. Y. 146, 82 A. D. 404. And see § 105(b), *infra*.

<sup>226</sup> *Green v. Waller*, 2 Ld. Raym. 891, 893; *Croudson v. Leonard*, 4 Cranch (U. S.) 434; *Rose v. Himely*, 4 Cranch (U. S.) 241; *Thompson v. Stewart*, 3 Conn. 171, 8 A. D. 168.

<sup>227</sup> *Henry v. Adey*, 3 East, 221; *Griswold v. Pitcairn*, 2 Conn. 85, 90; *Delafeld v. Hand*, 3 Johns. (N. Y.) 310. And see *In re Keeler*, Hemp. 306, Fed. Cas. No. 7,637.



curred with reference to them. Their controlling effect is like that of usages or general customs. Being so regarded in the domestic tribunals, they are not noticed judicially, but must be established by evidence.<sup>228</sup> A sister state is a foreign state, within the meaning of this rule,<sup>229</sup> in the absence of statute to

<sup>228</sup> *Fremoult v. Dedire*, 1 P. Wms. 429, 431; *Liverpool & G. W. S. Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Dainese v. Hale*, 91 U. S. 13; *Strother v. Lucas*, 6 Pet. (U. S.) 763; *Malpica v. McKown*, 1 La. 248, 20 A. D. 279; *Owen v. Boyle*, 15 Me. 147, 32 A. D. 143; *Charlotte v. Chouteau*, 25 Mo. 465; *Monroe v. Douglass*, 5 N. Y. 447; *State v. Looke*, 7 Or. 54. And see cases cited in note 198, *supra*.

The rule may be waived by the parties to the cause, in which case the court may take notice of the foreign law. *Bock v. Lauman*, 24 Pa. 435.

As to the law merchant, see § 100f, *supra*, and as to international law, see § 106, *infra*.

<sup>229</sup> ALABAMA: *Mobile & O. R. Co. v. Whitney*, 39 Ala. 468.

ARKANSAS: *Cox v. Morrow*, 14 Ark. 603.

CALIFORNIA: *Wickersham v. Johnson*, 104 Cal. 407, 43 A. S. R. 118; *Cavender v. Guild*, 4 Cal. 250.

COLORADO: *Atchison, T. & S. F. R. Co. v. Betts*, 10 Colo. 431; *Polk v. Butterfield*, 9 Colo. 325.

CONNECTICUT: *Hale v. New Jersey S. N. Co.*, 15 Conn. 539, 39 A. D. 398; *Fish v. Smith*, 73 Conn. 377, 84 A. S. R. 161.

FLORIDA: *Summer v. Mitchell*, 29 Fla. 179, 30 A. S. R. 106.

GEORGIA: *Simms v. Southern Exp. Co.*, 38 Ga. 129, 132.

ILLINOIS: *Chumasero v. Gilbert*, 24 Ill. 293.

INDIANA: *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 10 A. S. R. 67; *Billingsley v. Dean*, 11 Ind. 331.

IOWA: *Nesse v. Farmers' Ins. Co.*, 55 Iowa, 604.

KANSAS: *St. Louis & S. F. R. Co. v. Weaver*, 35 Kan. 412, 57 A. R. 176, 178; *Shed v. Augustine*, 14 Kan. 282.

KENTUCKY: *McDaniel v. Wright*, 7 J. J. Marsh. 475, 478; *Holley v. Holley*, Litt. Sel. Cas. 505, 12 A. D. 342.

LOUISIANA: *Syme v. Stewart*, 17 La. Ann. 73.

MAINE: *Owen v. Boyle*, 15 Me. 147, 32 A. D. 143.

MARYLAND: *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287.

MASSACHUSETTS: *Harvey v. Merrill*, 150 Mass. 1, 15 A. S. R. 159; *Portsmouth Livery Co. v. Watson*, 10 Mass. 91, 92; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 55 A. S. R. 414; *Kline v. Baker*, 99 Mass. 253,

the contrary.<sup>230</sup> Consequently, her laws, whatsoever the origin, must be proved as a fact. The rule applies in the admiralty, as in other courts.<sup>231</sup>

254; *Chipman v. Peabody*, 159 Mass. 420, 423, 38 A. S. R. 437, 439; *Palfrey v. Portland, S. & P. R. Co.*, 4 Allen, 55, 56.

MICHIGAN: *Chapman v. Colby*, 47 Mich. 46.

MINNESOTA: *Crandall v. Great Northern R. Co.*, 83 Minn. 190, 85 A. S. R. 458; *Schultz v. Howard*, 63 Minn. 196, 56 A. S. R. 470; *Myers v. Chicago, St. P., M. & O. R. Co.*, 69 Minn. 476, 65 A. S. R. 579; *Hoyt v. McNeil*, 13 Minn. 390 (Gil. 362).

MISSOURI: *Conrad v. Fisher*, 37 Mo. App. 352, 8 L. R. A. 147.

NEBRASKA: *Scroggin v. McClelland*, 37 Neb. 644, 40 A. S. R. 520.

NEW JERSEY: *Camplon v. Kille*, 15 N. J. Eq. 476; *Condit v. Blackwell*, 19 N. J. Eq. 193, 196.

NEW YORK: *Hunt v. Johnson*, 44 N. Y. 27, 4 A. R. 631; *Hosford v. Nichols*, 1 Paige, 220.

NORTH CAROLINA: *Hooper v. Moore*, 50 N. C. (5 Jones, Law) 130; *Hilliard v. Outlaw*, 92 N. C. 266.

OHIO: *Pelton v. Platner*, 13 Ohio, 209, 42 A. D. 197.

PENNSYLVANIA: *Phillips v. Gregg*, 10 Watts, 158, 36 A. D. 158; *Siegel v. Robinson*, 56 Pa. 19, 93 A. D. 775.

SOUTH DAKOTA: *Meuer v. Chicago, M. & St. P. R. Co.*, 5 S. D. 568, 49 A. S. R. 898.

TEXAS: *Anderson v. Anderson*, 23 Tex. 639; *Bufford v. Holliman*, 10 Tex. 560, 60 A. D. 223.

VERMONT: *Murtey v. Allen*, 71 Vt. 377, 76 A. S. R. 779; *Ward v. Morrison*, 25 Vt. 593.

VIRGINIA: *Warner v. Com.*, 2 Va. Cas. 95, 97.

WEST VIRGINIA: *Wilson v. Phoenix Power Mfg. Co.*, 40 W. Va. 413, 52 A. S. R. 890.

WISCONSIN: *Walsh v. Dart*, 12 Wis. 635; *Rape v. Heaton*, 9 Wis. 328, 76 A. D. 269; *Continental Nat. Bank v. McGeoch*, 73 Wis. 332.

The rule stated in the text seems no longer to prevail in Louisiana so far as the common law of a sister state is concerned, but statutes of sister states are not judicially noticed. *Rush v. Landers*, 107 La. 549, 57 L. R. A. 353.

<sup>230</sup> *Hanley v. Donoghue*, 116 U. S. 1, 7; *Hale v. New Jersey S. N. Co.*, 15 Conn. 539, 39 Am. Dec. 398; *Cutler v. Wright*, 22 N. Y. 472, 474; *Coffee v. Neely*, 2 Helsk. (Tenn.) 304; *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 52 A. S. R. 890.

<sup>231</sup> *The Prince George*, 4 Moore, P. C. 21; *The Peerless*, Lush. 30;

(b) **Exceptions and qualifications.** The rule that foreign law is not noticed judicially is well settled, but it has many important exceptions and qualifications, and these will now be considered.

While the domestic courts will not as a rule take judicial cognizance of the laws of another country, yet certain presumptions obtain in reference to the nature of foreign laws which often dispense with the necessity of adducing evidence of them. These presumptions are considered in another connection.<sup>232</sup> One may be mentioned here, however: While foreign law must be proved as matter of fact, yet, if it is ascertained as of a given date prior to the transaction in suit, it is to be considered as remaining the same unless evidence to the contrary is adduced.<sup>233</sup> And a decision of a domestic court defining particular rules of foreign law will be noticed judicially as an authority when the same rules afterwards come into question in the same jurisdiction.<sup>234</sup>

The federal courts, as we have seen, take cognizance of the laws of the various states of the Union. In view of this, it has

*Le Louis*, 2 Dod. 241; *The Pawashick*, 2 Low. 142, Fed. Cas. No. 10,851, *Thayer*, Cas. Ev. 31; *The Scotland*, 105 U. S. 24, 29; *Talbot v. Seeman*, 1 Cranch (U. S.), 1.

<sup>232</sup> See § 54, *supra*.

<sup>233</sup> *Malpica v. McKown*, 1 La. 248, 20 A. D. 279; *Arayo v. Currel*, 1 La. 528, 20 A. D. 286, 292; *Stokes v. Macken*, 62 Barb. (N. Y.) 145; *Meuer v. Chicago, M. & St. P. R. Co.*, 11 S. D. 94, 74 A. S. R. 774.

If proof of a foreign statute is given from a publication made under the authority of the foreign government of a date prior to the transaction in suit, the presumption is that it is still in force there, in the absence of evidence that it has been modified or repealed. *Cochran v. Ward*, 5 Ind. App. 89, 51 A. S. R. 229; *In re Huss*, 126 N. Y. 537, 12 L. R. A. 620.

<sup>234</sup> *The Pawashick*, 2 Lowell, 142, Fed. Cas. No. 10,851, *Thayer*, Cas. Ev. 31; *Graham v. Williams*, 21 La. Ann. 594. And see *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54, 81. *Contra*, *Westlake*, Priv. Int. Law, § 413; *McCormick v. Garnett*, 5 De Gex, M. & G. 278.

been held that even though a cause be instituted in a state court, yet, if it is of such a nature that the judgment may be reviewed by the federal supreme court, the state court in trying it may take judicial notice of the laws of a sister state. This question usually arises under that part of the constitution of the United States and the act of congress which require full faith and credit to be given in each state to the public acts, records, and judicial proceedings of every other state, when properly authenticated. Accordingly, in such a case the courts of most of the states will take judicial notice of the local laws of the state from which the record comes,<sup>235</sup> to the extent of determining whether the court rendering the judgment there had jurisdiction so to do.<sup>236</sup>

In extradition proceedings it is a fundamental question whether the alleged fugitive from justice is charged with a crime against the laws of the demanding state. Involving, as it does, not only the liberty of the citizen, but also the rights of another state, it has been thought to be the right, if not the duty, of the domestic courts, to seek the highest sources of information at their command to ascertain the laws of the demanding state relative to the alleged crime, and give them force and effect, without regard to whether they are formally proved.<sup>237</sup>

<sup>235</sup> *Paine v. Schenectady Ins. Co.*, 11 R. I. 411. *Contra*, *Hanley v. Donoghue*, 116 U. S. 1, Thayer, Cas. Ev. 26, 29; *Lloyd v. Matthews*, 155 U. S. 222; *Sammis v. Wightman*, 31 Fla. 10; *Rape v. Heaton*, 9 Wis. 328; *Osborn v. Blackburn*, 78 Wis. 209, 23 A. S. R. 400.

<sup>236</sup> *Rae v. Hulbert*, 17 Ill. 572; *Butcher v. Brownsville Bank*, 2 Kan. 70, 83 A. D. 446; *Dodge v. Coffin*, 15 Kan. 277; *Curtis v. Gibbs*, 2 N. J. Law, 290; *Ohio v. Hinchman*, 27 Pa. 479; *Trowbridge v. Spinning*, 23 Wash. 48, 83 A. S. R. 806. And see *Coffee v. Neely*, 2 Heisk. (Tenn.) 304; *Jarvis v. Robinson*, 21 Wis. 530, 94 A. D. 560, 561. Cases to the contrary will be found in the preceding note.

<sup>237</sup> *Barranger v. Baum*, 103 Ga. 465. And see *Ex parte Spears*, 88 Cal. 640, 22 A. S. R. 341.

If the laws of the forum recognize official acts done in pursuance of the laws of a foreign state, those laws may be judicially noticed by the domestic courts in passing on the validity of such acts. Thus, the *lex fori* often provides that an acknowledgment taken in another state in conformity with the laws thereof shall be regarded as valid by the domestic courts. In such a case, unless the domestic statute otherwise requires it,<sup>238</sup> no certificate of the character of the foreign officer taking the acknowledgment is necessary to give force to his act in the domestic courts.<sup>239</sup>

In so far as the law of one country has become a part of the law of another, the courts of the latter jurisdiction will take judicial notice of it. Thus, if one state is carved out of another, so much of the laws of the latter as were in existence and applicable to the new state at the time of the division may be noticed by the courts of the new state.<sup>240</sup> The same principle applies where a colony separates itself from the mother country and erects an independent government. So much of the laws of the mother country as were in existence and applicable to the new country at the time of the separation are a part of its laws and may be judicially noticed by its tribunals.<sup>241</sup> And the same principle applies where terri-

<sup>238</sup> *Fellows v. Menasha*, 11 Wis. 558.

<sup>239</sup> *Carpenter v. Dexter*, 8 Wall. (U. S.) 513; *Morse v. Hewett*, 28 Mich. 481; *Shotwell v. Harrison*, 22 Mich. 410; *Den d. Saltar v. Applegate*, 23 N. J. Law, 115.

<sup>240</sup> *Crandall v. Sterling G. Min. Co.*, 1 Colo. 106; *Henthorn v. Shepherd*, 1 Blackf. (Ind.) 157; *Holley v. Holley*, Litt. Sel. Cas. 505, 12 A. D. 342.

<sup>241</sup> *Owen v. Boyle*, 15 Me. 147, 32 A. D. 143; *Stokes v. Macken*, 62 Barb. (N. Y.) 145.

Laws enacted by the mother country after the separation do not, of course, fall within the operation of this principle. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397; *Spaulding v. Chicago & N. W. Ry. Co.*, 30 Wis. 110, 11 A. R. 550.

tory is ceded by one state to another.<sup>242</sup> So, if a country, now foreign, once formed a part of the same country with that of the forum,—as, for instance, Texas and Mexico,—the laws common to both at the time of separation do not require proof in either.<sup>243</sup>

Some facts concerning the common law as a system of judicature are noticed by the domestic courts even though a foreign country is involved. Thus, it has been judicially noticed by the courts of New York that the common law prevails in Canada,<sup>244</sup> and that it does not prevail in France.<sup>245</sup> For the purpose of determining what system of judicature prevails in a sister state, the domestic courts will take judicial notice whether the two states are of a common origin or were settled by people of a common country.<sup>246</sup>

<sup>242</sup> U. S. v. Turner, 11 How. (U. S.) 663; Doe d. Farmer's Heirs v. Esclava, 11 Ala. 1028; Chouteau v. Pierre, 9 Mo. 3; Ott v. Soulard, 9 Mo. 581. And see Malpica v. McKown, 1 La. 248, 20 A. D. 279; Arayo v. Currel, 1 La. 528, 20 A. D. 286.

The United States courts will take judicial notice of the laws of foreign countries which have ceded territory to the United States by treaty, such as Spain and Mexico, so far as to adjudicate titles claimed under those laws. U. S. v. Chaves, 159 U. S. 452, 459; Fremont v. U. S., 17 How. (U. S.) 542, 557; U. S. v. Perot, 98 U. S. 428.

<sup>243</sup> Malpica v. McKown, 1 La. 248, 20 A. D. 279; Arayo v. Currel, 1 La. 528, 20 A. D. 286; Stokes v. Macken, 62 Barb. (N. Y.) 145. See Lazier v. Westcott, 26 N. Y. 146, 82 A. D. 404. *Contra*, as to Maine and New Brunswick, Owen v. Boyle, 15 Me. 147, 32 A. D. 143 (semble).

<sup>244</sup> Lazier v. Westcott, 26 N. Y. 146, 82 A. D. 404.

The courts of Louisiana will take judicial cognizance of the prevalence of the common law in a sister state, and of the rule of the common law that a married woman cannot possess personal property independently of her husband except where a trust has been created for her separate benefit. But statutory modifications of the common law must be proved if relied upon. Rush v. Landers, 107 La. 549, 57 L. R. A. 353.

Judicial notice is not taken of the practice prevailing in a foreign court. Newell v. Newton, 10 Pick. (Mass.) 470, 472.

<sup>245</sup> In re Hall, 61 App. Div. (N. Y.) 266.

Hammon, Ev.—27.

## C. INTERNATIONAL AFFAIRS.

## § 106. Law.

Courts take judicial notice of the established principles of international law.<sup>247</sup> An exception to the rule that foreign laws are not judicially known to the courts exists in the case of rules which by the common consent of mankind have been acquiesced in as law by the various nations,—such, for instance, as the law of navigation as to carrying lights.<sup>248</sup> However, the general maritime law is in force in this country only so far as it has been adopted by the laws and usages here prevailing.<sup>249</sup>

## § 107. Treaties.

Treaties existing between the United States and foreign nations are judicially noticed, not only by the federal courts,<sup>250</sup> but also by the courts of the various states comprising the Union.<sup>251</sup> And the same rule applies to cessions of territory from state to state or from a state to the federal government.<sup>252</sup>

## § 108. War and peace.

The courts take judicial notice of whether a state of war or of peace exists between the domestic government and other

<sup>246</sup> *Birmingham W. W. Co. v. Hume*, 121 Ala. 168, 170, 77 A. S. R. 43, 44.

<sup>247</sup> *The Paquete Habana*, 175 U. S. 677; *Brown v. Piper*, 91 U. S. 37. *Thayer*, *Cas. Ev.* 17, 19; *U. S. v. Chaves*, 159 U. S. 452, 457.

<sup>248</sup> *The Scotia*, 14 Wall. (U. S.) 170.

<sup>249</sup> *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

<sup>250</sup> *Callsen v. Hope*, 75 Fed. 758; *Lacroix Fils v. Sarrazin*, 15 Fed. 489; *U. S. v. The Peggy*, 1 Cranch (U. S.) 103; *Ex parte McCabe*, 46 Fed. 363, 12 L. R. A. 589.

<sup>251</sup> *Godfrey v. Godfrey*, 17 Ind. 6, 79 A. D. 448; *Carson v. Smith*, 5 Minn. 78, 88 (Gil. 58); *Dole v. Wilson*, 16 Minn. 525 (Gil. 472); *Montgomery v. Deeley*, 3 Wis. 709, 712. See Const. U. S. art. 6.

<sup>252</sup> *Howard v. Moot*, 64 N. Y. 262; *People v. Snyder*, 41 N. Y. 397; *Lasher v. State*, 30 Tex. App. 387, 28 A. S. R. 922.

nations, and also of proclamations of the executive concerning the same;<sup>253</sup> but the relation existing in this respect between foreign powers is not taken notice of without evidence, as a rule.<sup>254</sup>

#### ART. III. MATTERS OF NOTORIETY.

Science, § 110.

(a) Course of nature.

(b) History.

(c) Geography.

Arts, § 111.

Language, § 112.

Human beings, § 113.

Animals, § 114.

Disease, § 115.

Tobacco and liquors, § 116.

Religious affairs, § 117.

Municipal affairs, § 118.

Railroads, § 119.

Electricity, § 120.

Banks and banking, § 121.

§ 109. Matters of common knowledge will be judicially noticed without evidence. What every man knows need not be proved. It would not be common sense to require proof of matters which are obviously susceptible of indisputable proof. Moreover, to indulge in such a requirement would well-nigh defeat the administration of justice. It is an established principle, therefore, that matters of notoriety need not be shown by evidence, but will be noticed judicially.<sup>255</sup>

<sup>253</sup> *Wells v. Williams*, 1 *Ld. Raym.* 282; *Dupays v. Shepherd*, 12 *Mod.* 216; *Dolder v. Huntingfield*, 11 *Ves.* 283; *Rex v. De Berenger*, 3 *Maule & S.* 67, 69; *Ogden v. Lund*, 11 *Tex.* 688.

The same rule applies in case of civil war, so far as concerns the domestic courts. *The Protector*, 12 *Wall. (U. S.)* 700; *Prize Cases*, 2 *Black (U. S.)* 635, 667; *Perkins v. Rogers*, 35 *Ind.* 124, 9 *A. R.* 639.

War and peace as matter of history, see § 110(b), *infra*.

<sup>254</sup> *Dolder v. Huntingfield*, 11 *Ves.* 283.



To dispense with the necessity for evidence on this ground, the fact in dispute must be unquestionably notorious in the jurisdiction where the court exercises its powers. A fact as to which there is doubt will not be judicially noticed.<sup>256</sup> Nor will judicial notice be taken of a matter merely because it is stated in encyclopedias or other books of knowledge.<sup>257</sup>

<sup>256</sup> UNITED STATES: *The Peterhoff*, Blatchf. Pr. Cas. 463, Fed. Cas. No. 11,024; *King v. Gallun*, 109 U. S. 99; *Schollenberger v. Pa.*, 171 U. S. 1, 8; *Gibbons v. Ogden*, 9 Wheat. 1, 220; *Phillips v. Detroit*, 111 U. S. 604, 606; *The Apollon*, 9 Wheat. 362, 374; *Von Mumm v. Wittemann*, 85 Fed. 966.

ALABAMA: *Burdine v. Grand Lodge*, 37 Ala. 478; *Davis v. Petrino-vich*, 112 Ala. 654, 36 L. R. A. 615.

ARKANSAS: *State v. Frederick*, 45 Ark. 347, 55 A. R. 555.

CALIFORNIA: *Everett v. Los Angeles Consol. Elec. R. Co.*, 115 Cal. 105, 34 L. R. A. 350; *Daggett v. Colgan*, 92 Cal. 53, 27 A. S. R. 95, 96.

ILLINOIS: *Braceville Coal Co. v. People*, 147 Ill. 66, 73, 37 A. S. R. 206, 211; *Chicago, B. & Q. R. Co. v. Warner*, 108 Ill. 538, 546; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492.

INDIANA: *State v. Schoonover*, 135 Ind. 526, 21 L. R. A. 767.

LOUISIANA: *Compagnie Francaise v. State Board of Health*, 51 La. Ann. 645, 56 L. R. A. 795.

MAINE: *Putnam v. White*, 76 Me. 551.

MASSACHUSETTS: *Gaynor v. Old Colony & N. R. Co.*, 100 Mass. 208, 97 A. D. 96.

MICHIGAN: *Grand Rapids v. Braudy*, 105 Mich. 670, 32 L. R. A. 116.

NEBRASKA: *Redell v. Moores*, 63 Neb. 219, 93 A. S. R. 431; *State v. Boyd*, 34 Neb. 435.

NEW YORK: *People v. Powers*, 147 N. Y. 104, 35 L. R. A. 502.

OREGON: *McKay v. Musgrove*, 15 Or. 162.

TENNESSEE: *Kerns v. Perry*, 48 S. W. 729.

WASHINGTON: *Bettman v. Cowley*, 19 Wash. 207, 40 L. R. A. 815; *Mullen v. Sackett*, 14 Wash. 100.

<sup>257</sup> *Blessing v. John Trageser S. C. Works*, 34 Fed. 753; *Kinney v. Koopman*, 116 Ala. 310, 67 A. S. R. 119; *McCormick Harvesting Mach. Co. v. Jacobson*, 77 Iowa, 582; *Patterson v. McCausland*, 3 Bland (Md.) 69; *N. W. Mfg. Co. v. Wayne Circ. Judge*, 58 Mich. 381, 55 A. R. 693, 695; *Imbrie v. Wetherbee & Co.*, 70 Mich. 103; *Tex. Standard Oil Co. v. Adoue*, 83 Tex. 650, 29 A. S. R. 690, 698. And see cases cited in notes 259, 260, *infra*.

The cases on this head turn on the individual experience and education of the different judges rather than on any well-defined rule,<sup>258</sup> and, if the judge entertains any doubt on the question of notoriety, he may require evidence to be introduced.<sup>259</sup> "This power," says Mr. Justice Swayne,<sup>260</sup> referring to the power of taking judicial notice, "is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative."

The standard of notoriety is "liable to constant changes with the advancement and gradual diffusion of science; many things which formerly were occult, and to be proved by experts,—as, for example, many facts in chemistry and the like,—being now, in the same places, matters of common learning in the public schools. The same may, in some degree, be said of every branch of physical science, of geographical knowledge, and of the religion and customs of foreign nations."<sup>261</sup> A corollary of this statement is that judicial precedents as to what may not be officially noticed by the court may lose their force with the passing of the years and the greater spread of knowledge regarding the subject of the decision. Matters which are little known today may be well known tomorrow. Consequently, a decision that a fact is not so well known as to be a fit subject of judicial notice may rightly be disregarded by the same court in later years, when the subject to which the

<sup>257</sup> *Kaolatype Engraving Co. v. Hoke*, 30 Fed. 444. On the other hand, it is scarcely necessary to add, judicial notice will not be refused merely because the fact in question has not been recorded in books of history or science. *Austin v. State*, 101 Tenn. 563, 566, 70 A. S. R. 703, 705.

<sup>258</sup> 3 Greenl. Ev. § 269.

<sup>259</sup> *Com. v. King*, 150 Mass. 221; *Baxter v. McDonnell*, 155 N. Y. 81 40 L. R. A. 670, 673. And see cases cited in note 256, *supra*.

<sup>260</sup> *Brown v. Piper*, 91 U. S. 37, Thayer, Cas. Ev. 17, 19.

<sup>261</sup> 3 Greenl. Ev. § 269.

decision relates has become a matter of common knowledge,—a suggestion to be digested by the “case lawyer.”<sup>262</sup>

In applying the principle that matters of notoriety will be judicially noticed, the courts of different states may well come to different conclusions as to the same fact. Facts well known by every person of intelligence in California, for instance, may be little known in Maine, and vice versa.<sup>263</sup> The question is, Is the fact a matter of notoriety in the jurisdiction where the case is tried? If so, the court should take judicial notice of it, even though it is not well known in other jurisdictions.<sup>264</sup> If, on the other hand, the fact is not well known there, though it may be a matter of notoriety elsewhere, the court should ordinarily require it to be proved.

#### § 110. Science.

Such matters falling within the domain of the positive sciences as are generally recognized as true may be noticed without evidence,<sup>265</sup> as, for example, the general facts of natural his-

<sup>262</sup> *State v. Me. Cent. R. Co.*, 86 Me. 309; *Grimes v. Eddy*, 126 Mo. 168, 179. In *Ex parte Powell*, 1 Ch. Div. 501, the court refused to take official notice of a custom which, six years later, in *Crawcour v. Salter*, 18 Ch. Div. 30, it took judicial notice of as being well known. “Inventions new and useful, and new industries and new enterprises consequent thereon, necessarily impose the duty of making new applications of legal principles. The world, in its industries and commerce, is making giant strides, and judicial science must struggle to keep pace with the necessities which are the fruits of such wonderful progress.” Thus, “the introduction of railroads, as highways of travel and transportation, has seemingly disturbed some of the old landmarks, and requires of the courts, in accommodation to the spirit of progress, that we apply principles, long well understood, to new conditions and exigencies.” *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413, 28 A. R. 740, 741, 743.

<sup>263</sup> 3 Greenl. Ev. § 269.

<sup>264</sup> *Smitha v. Flournoy's Adm'r*, 47 Ala. 345; *Geist v. Detroit City R.*, 91 Mich. 446.

<sup>265</sup> *Harvy v. Broad*, 2 Salk. 626; *Huggins v. Daley*, 99 Fed. 606, 48 L.

tory.<sup>266</sup> Thus, the courts will take official notice that certain matter is inflammable,<sup>267</sup> as natural gas<sup>268</sup> and kerosene;<sup>269</sup> and that gas forms from petroleum.<sup>270</sup> But the courts cannot take judicial notice of matters concerning which men eminent in the particular branch of learning differ.<sup>271</sup>

(a) **Course of nature.** Courts take judicial notice of the scientific facts usually to be found in almanacs.<sup>272</sup> They assume knowledge, without evidence, of the ordinary and invariable course of nature.<sup>273</sup> Thus, the movements of the heavenly

R. A. 320; *Falls v. U. S. Sav. L. & B. Co.*, 97 Ala. 417, 431, 38 A. S. R. 194, 209; *Bryan v. Beckley*, Litt. Sel. Cas. 91, 12 A. D. 276.

<sup>266</sup> *Rex v. Woodward*, 1 Moody, Cr. Cas. 323; *Lyon v. U. S.*, 8 U. S. App. 409, 412.

<sup>267</sup> *Contra*, as to gin, turpentine, and coal dust. *Cherokee & P. C. & M. Co. v. Wilson*, 47 Kan. 460; *Mosley v. Vermont Mut. Fire Ins. Co.*, 55 Vt. 142.

It is judicially known that dynamite is a dangerous explosive. *Fitzsimons & C. Co. v. Braun*, 199 Ill. 390, 59 L. R. A. 421.

<sup>268</sup> *Jamieson v. Indiana Nat. G. & O. Co.*, 128 Ind. 555, 12 L. R. A. 652; *Mississinewa Min. Co. v. Patton*, 129 Ind. 472, 28 A. S. R. 203.

Judicial notice is taken that natural gas does not explode spontaneously. *McGahan v. Indianapolis Nat. Gas Co.*, 140 Ind. 335, 49 A. S. R. 199.

That leaks occur in gas pipes, requiring immediate repair, is judicially known. *Indianapolis v. Consumers' Gas Trust Co.*, 140 Ind. 107, 118, 49 A. S. R. 183, 191.

<sup>269</sup> *State v. Hayes*, 78 Mo. 307. Judicial notice is not taken that kerosene is a refined coal oil or a refined earth oil. *Bennett v. North British & M. Ins. Co.*, 8 Daly (N. Y.) 471. *Contra*, *Morse v. Buffalo F. Ins. Co.*, 30 Wis. 534, 11 A. R. 587. Nor that it is in all cases explosive. *Wood v. N. W. Ins. Co.*, 46 N. Y. 421.

<sup>270</sup> *Fuchs v. St. Louis*, 133 Mo. 168, 34 L. R. A. 118.

<sup>271</sup> *St. Louis Gas Light Co. v. American Fire Ins. Co.*, 33 Mo. App. 348. See *Elliott on Evidence*, p. 69.

<sup>272</sup> *Thayer*, Prelim. Treat. Ev. 291; Y. B. 9 Hen. VII. 14, 1; *Queen v. Dyer*, 6 Mod. 41; *Page v. Faucet*, 1 Leon. 242, Cro. Eliz. 227; *Company of Stationers v. Seymour*, 1 Mod. 256; *Harvey v. Broad*, 6 Mod. 159, 196.

<sup>273</sup> *King v. Luffe*, 8 East, 193, 202; *Chesapeake & O. Canal Co. v. Bal-*

bodies are taken notice of judicially, as the time of the rising and the setting of the sun or moon on a given day.<sup>274</sup> The courts take official notice of the succession of the seasons,<sup>275</sup> and of the general changes in the weather attendant thereon in the latitude in which the jurisdiction lies.<sup>276</sup> So, the general divisions of time are judicially noticed,<sup>277</sup> the difference of time in different longitudes,<sup>278</sup> and the coincidence of days of the week with days of the month.<sup>279</sup> Judicial notice is also taken of the general course of agriculture, as the time for planting and the time for harvest.<sup>280</sup>

*timore & O. R. Co.*, 4 Gill & J. (Md.) 1. As to conception and gestation, see § 113, *infra*.

<sup>274</sup> *Louisville & N. R. Co. v. Brinckerhoff*, 119 Ala. 606; *People v. Chee Kee*, 61 Cal. 404; *People v. Mayes*, 113 Cal. 618; *State v. Morris*, 47 Conn. 179; *Case v. Perew*, 46 Hun (N. Y.) 57. *Contra*, *Tutton v. Darke*, 5 Hurl. & N. 647, 649; *Collier v. Nokes*, 2 Car. & K. 1012.

<sup>275</sup> *Tomlinson v. Greenfield*, 31 Ark. 557; *Ross v. Boswell*, 60 Ind. 235; *Abel v. Alexander*, 45 Ind. 523, 15 A. R. 270, 274; *Patterson v. McCausland*, 3 Bland (Md.) 69; *Lenahan v. People*, 3 Hun (N. Y.) 165, 168.

<sup>276</sup> *Haines v. Gibson*, 115 Mich. 131; *Jackson v. Wisconsin Tel. Co.*, 88 Wis. 243, 26 L. R. A. 101. *Contra*, it seems, *Dixon v. Niccolls*, 39 Ill. 372, 89 A. D. 312.

The condition of the weather on a given day in the past cannot be noticed judicially. *McCormick Harvesting Mach. Co. v. Jacobson*, 77 Iowa, 582.

<sup>277</sup> *State v. Morris*, 47 Conn. 179, 180; *Lenahan v. People*, 3 Hun (N. Y.) 165, 168. See *People v. Constantino*, 153 N. Y. 24.

<sup>278</sup> *Curtis v. March*, 4 Jur. (N. S.) 1112.

<sup>279</sup> *Hoyle v. Cornwallis*, 1 Strange, 387; *Page v. Faucet*, Cro. Eliz. 227; *Rodgers v. State*, 50 Ala. 102; *Sprowl v. Lawrence*, 33 Ala. 674; *Dawkins v. Smithwick*, 4 Fla. 158; *Swales v. Grubbs*, 126 Ind. 106; *McIntosh v. Lee*, 57 Iowa, 356; *Kilgour v. Miles*, 6 Gill & J. (Md.) 268; *Sasscer v. Farmers' Bank*, 4 Md. 409; *Philadelphia, etc., W. & B. R. Co. v. Lehman*, 56 Md. 209, 40 A. R. 415, 416; *Morgan v. Burrow* (Miss.) 16 So. 432; *State v. Todd*, 72 Mo. 288; *Reed v. Wilson*, 41 N. J. Law, 29; *Wilson v. Van Leer*, 127 Pa. 321, 14 A. S. R. 854.

The courts of England take official notice also of the correspondence between the dominical year and the year of any king's reign. *Holman v. Burrow*, 2 Ld. Raym. 791, 794.

(b) **History.** Every judge is bound to take official notice of the leading facts composing the general history of the country wherein he presides,<sup>281</sup> as well to aid him in a proper con-

<sup>280</sup> *Loeb v. Richardson*, 74 Ala. 311; *Wetzler v. Kelly*, 83 Ala. 440; *Person v. Wright*, 35 Ark. 169; *Floyd v. Ricks*, 14 Ark. 286, 58 A. D. 374; *Mahoney v. Aurrecochea*, 51 Cal. 429; *Brown v. Anderson*, 77 Cal. 236; *Ross v. Boswell*, 60 Ind. 235; *Abel v. Alexander*, 45 Ind. 523, 15 A. R. 270, 274; *Raridan v. Central Iowa R. Co.*, 69 Iowa, 527, 530 (semble); *Garth v. Caldwell*, 72 Mo. 622.

The courts will take official notice that, owing to the nature of cotton as a growing crop, and the usual methods adopted of gathering and ginning, it is peculiarly exposed to theft until it is baled. *State v. Moore*, 104 N. C. 714, 17 A. S. R. 696.

Judicial notice is not taken of the precise day on which a crop reaches its maturity. *Dixon v. Niccolls*, 39 Ill. 372, 89 Am. Dec. 312; *Culverhouse v. Worts*, 32 Mo. App. 419. Nor of the fact that sowing oats or planting corn in a young orchard is not good care or husbandry; nor that good care will make poor varieties of trees bear good fruit. *Long v. Pruyn*, 128 Mich. 57, 92 A. S. R. 443.

<sup>281</sup> *Augusta Bank v. Earle*, 13 Pet. (U. S.) 519; *De Celis' Adm'r v. U. S.*, 18 Ct. Cl. 117, 126; *Lewis v. Harris*, 31 Ala. 689; *Trenier v. Stewart*, 55 Ala. 458; *Conger v. Weaver*, 6 Cal. 548, 65 A. D. 528; *Bulpit v. Matthews*, 145 Ill. 345, 22 L. R. A. 55; *Braceville Coal Co. v. People*, 147 Ill. 66, 73, 37 A. S. R. 206, 211; *Williams v. State*, 64 Ind. 553, 31 A. R. 135; *State v. Boyd*, 34 Neb. 435; *Jack v. Martin*, 12 Wend. (N. Y.) 328 (semble); *Sargent v. Lawrence*, 16 Tex. Civ. App. 540; *Isaacs v. Barber*, 10 Wash. 124, 45 A. S. R. 772. *Contra*, *Gregory v. Baugh*, 4 Rand. (Va.) 611.

The supreme court of Kansas, in 1891, took judicial notice of whether, thirty years previously, "that region of country known as 'Pike's Peak' lay within the boundaries of the territory of Kansas." *Carey v. Reeves*, 46 Kan. 571.

The court may take official notice that, before and after the state was admitted into the Union, the riparian owners along the navigable fresh-water streams within its limits acted on the assumption that the right of wharfage was incident to their land, and built wharves accordingly. *Lewis v. Portland*, 25 Or. 133, 161, 42 A. S. R. 772, 783. Also that, since the early settlement of the western portions of the state, where irrigation has been found essential to successful agriculture, a practice has existed of appropriating and diverting waters from

struction of its laws<sup>282</sup> as because such facts are matters of notoriety. Important illustrations of this principle are found in cases wherein the court has taken judicial cognizance of matters concerning the Civil War, its existence, causes, conduct, duration, and results, including matters relating to the period of reconstruction.<sup>283</sup> The current history of the public business of the state may also be noticed without evidence, as that books known as "plat books" have been kept for many years as public records by the recorders in the various counties of the state, in which are recorded the plats of towns and cities and additions thereto.<sup>284</sup>

Local history,—that is, history affecting only an inconsidera-

their natural channels into canals for irrigation purposes. *Crawford Co. v. Hall* [Neb.] 60 L. R. A. 889.

It is matter of public history that along the valleys of the Lehigh and Schuylkill there are great numbers of blast furnaces, rolling mills, rail mills, foundries, machine shops, and numerous other manufacturing establishments, which consume enormous quantities of the coal output of the state, and that at the same time, in the villages, towns, and cities which abound in these regions, an immensely large industry in the buying and selling of coal for domestic consumption is also carried on. *Hoover v. Pa. R.*, 156 Pa. 220, 233, 36 A. S. R. 43, 51.

History of legislation, see § 100(b), *supra*; of religion, see § 117, *infra*; of currency, see § 101(a), *supra*.

<sup>282</sup> *Stout v. Grant County Com'rs*, 107 Ind. 343; *Redell v. Moores*, 63 Neb. 219, 93 A. S. R. 431. History of legislation, see § 8(c), note 135, *supra*.

<sup>283</sup> *The Protector*, 12 Wall. (U. S.) 700; *Cross v. Sabin*, 13 Fed. 308; *Cuyler v. Ferrill*, 1 Abb. U. S. 169, Fed. Cas. No. 3,523; *Ferdinand v. State*, 39 Ala. 706; *Foscue v. Lyon*, 55 Ala. 440; *Rice v. Shook*, 27 Ark. 137, 11 A. R. 783; *Williams v. State*, 67 Ga. 260; *Perkins v. Rogers*, 35 Ind. 124, 9 A. R. 639; *Hill v. Baker*, 32 Iowa, 302, 7 A. R. 193; *Lanfear v. Mestier*, 18 La. Ann. 497, 89 A. D. 658; *Douthitt v. Stinson*, 63 Mo. 268; *Swinnerton v. Columbian Ins. Co.*, 37 N. Y. 174, 93 A. D. 560; *Gates v. Johnson County*, 36 Tex. 144; *Caperton v. Martin*, 4 W. Va. 138, 6 A. R. 270; *Simmons v. Trumbo*, 9 W. Va. 358. Military orders, see § 97(c), *supra*.

<sup>284</sup> *Miller v. Indianapolis*, 123 Ind. 196.

ble portion of the jurisdiction where the court presides,—and other matters which have not become generally known, or as to which there is dispute, will not be judicially noticed, but must be established by evidence.<sup>285</sup> For instance, the courts do not take judicial notice whether a particular locality was held by one belligerent or the other at a particular time in the period of the Civil War.<sup>286</sup>

(c) **Geography.** The court will assume knowledge of many matters of geography, taking notice of the leading physical features of the country,<sup>287</sup> and also of some features of foreign geography;<sup>288</sup> “but the minuteness of such knowledge is inversely proportional to the distance, being much more specific and detailed in regard to the territory over which the court has jurisdiction than with respect to foreign lands or even different states.”<sup>289</sup> Thus, judicial notice is taken of the ex-

<sup>285</sup> *McKinnon v. Bliss*, 21 N. Y. 206; *Morris v. Edwards*, 1 Ohio, 189, 207; *Kelley v. Story*, 6 Heisk. (Tenn.) 202; *Bishop v. Jones*, 28 Tex. 294. Thus, the courts cannot take official notice that the courts of a particular county in Tennessee were closed during the war. *Cross v. Sabin*, 13 Fed. 308. *Contra*, *Killebrew v. Murphy*, 3 Heisk. (Tenn.) 546.

<sup>286</sup> *McDonald v. Kirby*, 3 Heisk. (Tenn.) 607.

<sup>287</sup> *The Apollon*, 9 Wheat. (U. S.) 362, 374; *U. S. v. La Vengeance*, 3 Dall. (U. S.) 297; *Trenier v. Stewart*, 55 Ala. 58; *Parker v. State*, 133 Ind. 178, 18 L. R. A. 567; *Mossman v. Forrest*, 27 Ind. 233; *Gilbert v. Moline W. P. & Mfg. Co.*, 19 Iowa, 319; *Carey v. Reeves*, 46 Kan. 571; *People v. Brooks*, 101 Mich. 98; *Price v. Page*, 24 Mo. 65; *Winnipiseogee Lake Co. v. Young*, 40 N. H. 420; *Gulf, C. & S. F. R. Co. v. State*, 72 Tex. 404, 13 A. S. R. 815; *Isaacs v. Barber*, 10 Wash. 124, 45 A. S. R. 772.

The topography of all sections of a state are noticed by the courts thereof. *State v. Polk County Com'rs*, 87 Minn. 325, 60 L. R. A. 161.

Railroads as constituting geographical features, see § 119, *infra*.

Matters of political geography are considered also in other connections. See § 95, *supra*, as to domestic geography, and § 102, *supra*, as to foreign geography.

<sup>288</sup> *Whitney v. Gauche*, 11 La. Ann. 432. See, also, § 102, *supra*.

<sup>289</sup> *H. Campbell Black*, 24 Am. Law Reg. 570; *Pearce v. Langfit*, 101 Pa. 507, 512, 47 A. R. 737.



istence, source, course, and destination, and of the character as to navigability, ebb and flow of tide, etc., of the larger streams of the state and country.<sup>290</sup> And the federal courts take official notice of the ports and waters of the United States wherein the tide ebbs and flows,<sup>291</sup> for the purpose of determining whether the jurisdiction of the admiralty prevails there.<sup>292</sup>

Distances between well-known places within or without the state may be judicially recognized in a general way,<sup>293</sup> as that a named town is more than thirty miles from the place of trial;<sup>294</sup> and generally of the time it takes to cover that distance by rail<sup>295</sup> or water.<sup>296</sup>

<sup>290</sup> *The Montello*, 11 Wall. (U. S.) 411, 414; *King v. American Transp. Co.*, 1 Flap. 1, Fed. Cas. No. 7,787; *Olive v. State*, 86 Ala. 88, 4 L. R. A. 33; *People v. Truckee Lumber Co.*, 116 Cal. 397, 58 A. S. R. 183; *De Baker v. Southern Cal. R. Co.*, 106 Cal. 257, 46 A. S. R. 237; *Neaderhouser v. State*, 28 Ind. 257; *Cash v. Clark County*, 7 Ind. 227; *Whitney v. Gauche*, 11 La. Ann. 432; *Com. v. King*, 150 Mass. 221; *Talbot v. Hudson*, 16 Gray (Mass.) 417, 424; *Cummings v. Stone*, 13 Mich. 70; *Flanigen v. Wash. Ins. Co.*, 7 Pa. 306, 311; *Tewksbury v. Schulenberg*, 41 Wis. 584. See *Harrigan v. Conn. River Lumber Co.*, 129 Mass. 580, 37 A. R. 387.

The character of small streams whose capacity is not historical and traditional will not be noticed judicially. *Buffalo Pipe Line Co. v. N. Y., L. E. & W. R. Co.*, 10 Abb. N. C. (N. Y.) 107.

<sup>291</sup> *Brown v. Piper*, 91 U. S. 37, Thayer, Cas. Ev. 17, 19.

<sup>292</sup> *Peyroux v. Howard*, 7 Pet. (U. S.) 324.

<sup>293</sup> *Hoyt v. Russell*, 117 U. S. 401; *Mut. Ben. L. Ins. Co. v. Robison*, 58 Fed. 723, 19 U. S. App. 266, 22 L. R. A. 325; *Rice v. Montgomery*, 4 Biss. 75, 77, Fed. Cas. No. 11,753; *Hegard v. Cal. Ins. Co. (Cal.)* 11 Pac. 594; *Jamieson v. Ind. N. G. & O. Co.*, 128 Ind. 555, 12 L. R. A. 652; *Pettit v. State*, 135 Ind. 393, 412; *Pearce v. Langfit*, 101 Pa. 507, 47 A. R. 737; *Blumenthal v. Pac. Meat Co.*, 12 Wash. 331; *Siegbert v. Stiles*, 39 Wis. 533. It has been held, however, that the courts will not take judicial notice of the local situation of places in counties, and the distances between them. *Deybel's Case*, 4 Barn. & Ald. 243; *Goodwin v. Appleton*, 22 Me. 453. Nor of the facilities for communication between such places. *Boggs v. Clark*, 37 Cal. 236.

<sup>294</sup> *Hinckley v. Beckwith*, 23 Wis. 328.

Judicial notice may be taken also of the chief cities or commercial centers of the state, and of the chief districts which produce a given agricultural commodity.<sup>297</sup>

### § 111. Arts.

Well-known arts and processes are judicially recognized by the courts.<sup>298</sup> Judicial notice is accordingly taken of telephony as a proper means of communication, and of its nature, operation, and ordinary uses.<sup>299</sup> And photography is judicially recognized as a proper means of producing correct likenesses under proper conditions.<sup>300</sup> However, the court will not assume that a particular photograph accurately or fairly represents the object it purports to represent; and accordingly evidence must be introduced to that effect, in order to render the photograph admissible as evidence.<sup>301</sup>

### § 112. Language.

The courts will take judicial notice of the vernacular language, construing words in general use in the same sense as

<sup>295</sup> *Pettit v. State*, 135 Ind. 393, 412; *Fitzpatrick v. Papa*, 89 Ind. 17, 20; *Pearce v. Langft*, 101 Pa. 507, 47 A. R. 737. The time required to transport money from one city to another by express is not known judicially. *Rice v. Montgomery*, 4 Biss. 75, Fed. Cas. No. 11,753.

<sup>296</sup> *Oppenheim v. Wolf*, 3 Sandf. Ch. (N. Y.) 571.

<sup>297</sup> *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 29 A. S. R. 690, 698.

<sup>298</sup> *Brown v. Piper*, 91 U. S. 37, Thayer, Cas. Ev. 17; *Phillips v. Detroit*, 111 U. S. 604, 606; *Ligowski Clay-Pigeon Co. v. American Clay-Bird Co.*, 34 Fed. 328; *Lamson Consolidated Service Co. v. Siegel-Cooper Co.*, 106 Fed. 734; *Beck & P. L. Co. v. Evansville B. Co.*, 25 Ind. App. 662.

<sup>299</sup> *Shawyer v. Chamberlain*, 113 Iowa, 742, 86 A. S. R. 411; *Globe Printing Co. v. Stahl*, 23 Mo. App. 451; *Wolfe v. Missouri P. R. Co.*, 97 Mo. 473.

<sup>300</sup> *Luke v. Calhoun County*, 52 Ala. 115; *Dyson v. New York & N. E. R. Co.*, 57 Conn. 9; *Cowley v. People*, 83 N. Y. 464, 38 A. R. 464, 472; *Udderzook v. Com.*, 76 Pa. 340.

<sup>301</sup> *Goldsboro v. Central R. Co.*, 60 N. J. Law, 49. See *Blair v. Pelham*,

they are understood by the mass of men; and consequently no allegation or evidence of such meaning is necessary.<sup>302</sup> If they are current, this is true also of technical terms,<sup>303</sup> and of words and phrases that have acquired a peculiar meaning in the jurisdiction where the court sits, whether or not they are to be found in the dictionaries;<sup>304</sup> but newly coined terms will not be judicially noticed unless they have a certain meaning and have become generally known.<sup>305</sup>

Upon the same principle, common abbreviations are recognized by the courts without evidence of their meaning;<sup>306</sup> but,

118 Mass. 420; *Dederichs v. Salt Lake City R. Co.*, 14 Utah, 137, 35 L. R. A. 802.

<sup>302</sup> *Towgood v. Pirie*, 35 Wkly. Rep. 729; *Watson v. State*, 55 Ala. 158, 160; *Rhodes v. Naglee*, 66 Cal. 677; *Edwards v. San Jose Print. Soc.*, 99 Cal. 431, 37 A. S. R. 70; *Frese v. State*, 23 Fla. 267; *Nelson v. Cushing*, 2 Cush. (Mass.) 519, 533; *Attorney-General v. Dublin*, 38 N. H. 459, 513; *Smith v. Clayton*, 29 N. J. Law, 357, 367; *Power v. Bowdle*, 3 N. D. 107, 44 A. S. R. 511.

The fluctuations and mutations of the language are also noticed by the courts without evidence. *Vanada's Heirs v. Hopkins' Adm'rs*, 1 J. J. Marsh. (Ky.) 285, 19 A. D. 92; *Lampton v. Haggard*, 3 T. B. Mon. (Ky.) 149.

Meaning of words as applied to intoxicating liquors, see § 116, *infra*.

<sup>303</sup> *State v. Baldwin*, 36 Kan. 1.

<sup>304</sup> *Shore v. Willson*, 9 Clark & F. 355, 568; *Adler v. State*, 55 Ala. 16; *Sinnott v. Colombet*, 107 Cal. 187, 28 L. R. A. 594; *Clarke v. Fitch*, 41 Cal. 472; *Lohman v. State*, 81 Ind. 15; *Linck v. Kelley*, 25 Ind. 278, 87 A. D. 362; *Bailey v. Kalamazoo Pub. Co.*, 40 Mich. 251; *Edgar v. McCutchen*, 9 Mo. 768.

The court knows judicially that "brass knuckles," so called, are not always made of brass, but may be made of any other metal. *Louis v. State*, 36 Tex. Cr. R. 52, 61 A. S. R. 832.

<sup>305</sup> *In re Bodmin United Mines Co.*, 23 Beav. 370; *Linck v. Kelley*, 25 Ind. 278, 87 A. D. 362; *Baltimore v. State*, 15 Md. 376. Thus, when matter is couched in language having a covert meaning, or in words or phrases not used otherwise than as slang or cant terms, the court will not take judicial notice of the meaning. *Edwards v. San Jose Print. Soc.*, 99 Cal. 431, 435, 37 A. S. R. 70, 73.

unless the abbreviation is in common use, its meaning must be established by evidence.<sup>307</sup>

These rules do not apply to foreign languages. The courts do not take judicial cognizance either of the proper mode of speaking or writing a foreign tongue, or, ordinarily, of the meaning of particular words belonging to it.<sup>308</sup>

Matters of general literature which have become a part of the language, such as well-known fables, may be noticed by the courts without evidence of their meaning;<sup>309</sup> and in a general way the courts take judicial notice of the contents of the Bible.<sup>310</sup>

<sup>306</sup> *Acc't*, *Heaton v. Ainley*, 108 Iowa, 112.

*Adm'r*, *Moseley's Adm'r v. Mastin*, 37 Ala. 216.

*A. M., P. M.*, *Hedderich v. State*, 101 Ind. 564.

*Christian names*, *Stephen v. State*, 11 Ga. 225; *Weaver v. McElhenon*, 13 Mo. 89.

*C. O. D.*, *U. S. Exp. Co. v. Keefer*, 59 Ind. 263; *State v. Moffit*, 73 Me. 278. *Contra*, *McNichol v. Pac. Exp. Co.*, 12 Mo. App. 401.

*Dates*, *Lakemeyer's Estate*, 135 Cal. 28, 87 A. S. R. 96.

*J. P.*, *Shattuck v. People*, 4 Scam. (Ill.) 477, 481.

*Land descriptions*, *Kile v. Yellowhead*, 80 Ill. 208; *Paris v. Lewis*, 85 Ill. 597; *McChesney v. Chicago*, 173 Ill. 75; *Frazer v. State*, 106 Ind. 471; *Richards v. Snider*, 11 Or. 197. *Contra*, *Power v. Bowdle*, 3 N. D. 107, 44 A. S. R. 511.

*N. P.*, *Rowley v. Berrian*, 12 Ill. 198, 200.

*Railroad names*, *Ripley v. Case*, 78 Mich. 126, 18 A. S. R. 428. *Contra*, *Accolo v. Chicago, B. & Q. R. Co.*, 70 Iowa, 185.

<sup>307</sup> *County names*, *Vivian v. State*, 16 Tex. App. 262.

*Judg.*, *Cassidy v. Holbrook*, 81 Me. 589.

*Printers' marks*, *Johnson v. Robertson*, 31 Md. 476.

*State names*, *Ellis v. Park*, 8 Tex. 205; *Russell v. Martin*, 15 Tex. 238. (These two decisions are indefensible.)

*Trade abbreviations*, *Dages v. Brake*, 125 Mich. 64, 84 A. S. R. 556.

<sup>308</sup> *State v. Johnson*, 26 Minn. 316.

<sup>309</sup> *Thayer*, *Prel. Treat. Ev.* 303. And see *Hoare v. Silverlock*, 12 Q. B. 624, 12 Jur. 695. In *Forbes v. King*, 1 Dowl. 672, the court refused to take judicial notice that the Christian name Friday applied to a man imputes degradation.

<sup>310</sup> *Thayer*, *Prel. Treat. Ev.* 303; *State v. Edgerton School Board*, 76 Wis. 177, 20 A. S. R. 41.

### § 113. Human beings.

The laws of conception and gestation are noticed judicially so far as applicable to human beings;<sup>311</sup> and judicial notice is taken also of the average duration and expectancy of human life, as shown by standard tables of mortality.<sup>312</sup> So, the courts may take official notice, in a general way, of the size of the human body and its various parts,<sup>313</sup> and of the effect of the loss of a member as to pain and subsequent earning capacity.<sup>314</sup>

Judicial notice is taken of the ordinary habits of men, the ordinary rules of thinking and reasoning, and the ordinary data of human experience.<sup>315</sup> Thus, the ways of children

<sup>311</sup> *Heathcote's Divorce Bill*, 1 Macq. H. L. Cas. 277; *Rex v. Luffe*, 8 East, 193, 202; *State v. Lingle*, 128 Mo. 528, 540; *Erickson v. Schmill*, 62 Neb. 368. And see *Whitman v. State*, 34 Ind. 360; *Floyd v. Johnson*, 2 Litt. (Ky.) 109, 13 A. D. 255, 259; *Eddy v. Gray*, 4 Allen (Mass.) 435.

<sup>312</sup> *Gordon v. Tweedy*, 74 Ala. 232, 49 A. R. 813; *Kan. City, M. & B. R. Co. v. Phillips*, 98 Ala. 159; *McHenry v. Yokum*, 27 Ill. 160; *Scheffler v. Minneapolis & St. L. R. Co.*, 32 Minn. 518; *Johnson v. Hudson River R. Co.*, 6 Duer (N. Y.) 633. And see *N. E. R. Co. v. Chandler*, 84 Ga. 37; *Blair v. Madison County*, 81 Iowa, 313; *Estabrook v. Hapgood*, 10 Mass. 313; *Jackson v. Edwards*, 7 Paige (N. Y.) 386, 408; *Davis v. Standish*, 26 Hun (N. Y.) 608. Mortality tables are not conclusive on the court, however. *Scheffler v. Minneapolis & St. L. R. Co.*, *supra*. It was said in *Gordon v. Tweedy*, *supra*, that the Carlisle and Northampton tables of mortality have been superseded in America by the American Table of Mortality. The Northampton table was used, however, in *Davis v. Standish*, *supra*, and the Carlisle table was approved in *Lincoln v. Power*, 151 U. S. 436, 441, and in the above cited cases of *N. E. R. Co. v. Chandler*, *Blair v. Madison County*, and *Scheffler v. Minneapolis & St. L. R. Co.*

<sup>313</sup> *Hunter v. N. Y., O. & W. R. Co.*, 116 N. Y. 615; *Johns v. N. W. Mut. Rel. Ass'n*, 90 Wis. 332, 41 L. R. A. 587.

<sup>314</sup> *Chicago, B. & Q. R. Co. v. Warner*, 108 Ill. 538, 546.

<sup>315</sup> *Hopkinson v. Knapp & S. Co.*, 92 Iowa, 328; *Lamoureux v. N. Y., N. H. & H. R. Co.*, 169 Mass. 338; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274; *Reynolds v. N. Y. Cent. & H. R. R. Co.*, 58 N. Y. 248, 252.

are judicially noticed,<sup>316</sup> their earning capacity,<sup>317</sup> and the nature of their playthings.<sup>318</sup> And under some circumstances the court may assume knowledge of the names of prominent men.<sup>319</sup>

#### § 114. Animals.

Various matters relating to animals are noticed by the courts without evidence. Thus, judicial notice is taken that coyotes are a pest to breeders of small domestic animals;<sup>320</sup> that different varieties of fish inhabit the same waters;<sup>321</sup> that horses are frightened at horseless vehicles;<sup>322</sup> that horses otherwise tractable are apt to run away if suddenly freed from control while moving;<sup>323</sup> that pedigree is an element of value;<sup>324</sup> and of other matters of notoriety concerning animals.<sup>325</sup>

#### § 115. Disease.

Facts concerning disease may be officially noticed by the courts, if of sufficient notoriety. Thus, judicial notice is taken of the existence and the nature of a disease among trees known

<sup>316</sup> *Spengler v. Williams*, 67 Miss. 1.

<sup>317</sup> *Southern R. Co. v. Covenia*, 100 Ga. 46, 62 A. S. R. 312.

<sup>318</sup> *Harris v. Cameron*, 81 Wis. 239, 29 A. S. R. 891.

<sup>319</sup> Y. B. 30 & 31 Edw. I. 256. We have seen, in other connections, that the names of certain public officers are noticed by the courts without evidence. See §§ 97-99, 104, *supra*.

<sup>320</sup> *Ingram v. Colgan*, 106 Cal. 113, 123, 46 A. S. R. 221, 228.

<sup>321</sup> *State v. Mrozinski*, 59 Minn. 465, 27 L. R. A. 76.

<sup>322</sup> *State v. Me. Cent. R. Co.*, 86 Me. 309; *Meyer v. Krauter*, 56 N. J. Law, 696, 24 L. R. A. 575. However, it is judicially known that a box car standing still at a crossing is not of itself a frightful object to horses of ordinary gentleness. *Gilbert v. Flint & P. M. R. Co.*, 51 Mich. 483.

<sup>323</sup> *Jollet v. Shufeldt*, 144 Ill. 403, 413, 36 A. S. R. 453, 458.

<sup>324</sup> *Citizens' R. T. Co. v. Dew*, 100 Tenn. 317, 325, 66 A. S. R. 754, 759.

<sup>325</sup> *Lyon v. U. S.*, 8 U. S. App. 409, 412; *Hart v. Wash. Park Club*, 157 Ill. 9, 16, 48 A. S. R. 298, 303; *State v. Mrozinski*, 59 Minn. 465, 27 L. R. A. 76. Diseases of animals, see § 115, *infra*.

as "the yellows;"<sup>326</sup> that fright may wreck the nervous system;<sup>327</sup> that disease may be communicated by means of second-hand clothing,<sup>328</sup> or through the uncleanness of barbers;<sup>329</sup> and that cattle from a certain part of Texas have some disease communicative to cattle outside of that state.<sup>330</sup> The courts will not, however, assume knowledge as to whether typhoid fever is infectious,<sup>331</sup> nor that a man is in great danger of contracting glanders by coming into contact with a horse having that disease.<sup>332</sup>

### § 116. Tobacco and liquors.

The courts will take judicial notice of the nature and qualities of tobacco,<sup>333</sup> and of the harmlessness of the process of manufacturing it into cigars;<sup>334</sup> also, that cigarettes are deleterious to the health;<sup>335</sup> and that tobacco, if taken into the stomach, may produce nausea.<sup>336</sup> They do not officially know of any necessity for its use on a particular day by a confirmed smoker.<sup>337</sup>

The courts will take judicial notice that many kinds of liquor are intoxicating,—such, for instance, as alcohol,<sup>338</sup> brandy,<sup>339</sup>

<sup>326</sup> *State v. Main*, 69 Conn. 123, 61 A. S. R. 30.

<sup>327</sup> *Sloane v. Southern Cal. R. Co.*, 111 Cal. 668, 32 L. R. A. 193.

<sup>328</sup> *Rosenbaum v. Newbern*, 118 N. C. 83, 32 L. R. A. 123.

<sup>329</sup> *State v. Zeno*, 79 Minn. 80, 48 L. R. A. 88.

<sup>330</sup> *Kimmish v. Ball*, 129 U. S. 217; *Grimes v. Eddy*, 126 Mo. 168, 178, 47 A. S. R. 653, 659.

<sup>331</sup> *State v. Tenant*, 110 N. C. 609, 28 A. S. R. 715, 721.

<sup>332</sup> *State v. Fox*, 79 Md. 514, 47 A. S. R. 424.

<sup>333</sup> *Com. v. Marzynski*, 149 Mass. 68, 72.

<sup>334</sup> *In re Jacobs*, 98 N. Y. 98, 50 A. R. 636, 645.

<sup>335</sup> *Austin v. State*, 101 Tenn. 563, 70 A. S. R. 703.

<sup>336</sup> *State v. Johnson*, 118 Mo. 491, 40 A. S. R. 405.

<sup>337</sup> *Mueller v. State*, 76 Ind. 310, 40 A. R. 245, 249.

<sup>338</sup> *Snider v. State*, 81 Ga. 753, 12 A. S. R. 350.

<sup>339</sup> *Fenton v. State*, 100 Ind. 598; *State v. Tisdale*, 54 Minn. 105; *Thomas v. Com.*, 90 Va. 92.

whisky,<sup>340</sup> gin,<sup>341</sup> wine,<sup>342</sup> and Jamaica ginger.<sup>343</sup> It is otherwise as to cider;<sup>344</sup> and many names commonly applied to intoxicants will not be assumed by the court to refer to these alone, if they are frequently applied to non-intoxicants as well,<sup>345</sup> examples of the latter qualification being beer<sup>346</sup> and other malt or hop liquors.<sup>347</sup>

Judicial notice is taken that the use of beer as a beverage is not necessarily hurtful,<sup>348</sup> and that intoxicating liquors are

<sup>340</sup> U. S. v. Ash, 75 Fed. 651; Frese v. State, 23 Fla. 267; Schlicht v. State, 56 Ind. 173; Loveless v. State (Tex. Cr. App.) 49 S. W. 602.

<sup>341</sup> Com. v. Peckham, 2 Gray (Mass.) 514, Thayer, Cas. Ev. 17.

<sup>342</sup> Wolf v. State, 59 Ark. 297, 43 A. S. R. 34; Starace v. Rossi, 69 Vt. 303. And see Worley v. Spurgeon, 38 Iowa, 465.

<sup>343</sup> Mitchell v. Com., 21 Ky. L. R. 222, 51 S. W. 17.

<sup>344</sup> Topeka v. Zufall, 40 Kan. 47; Com. v. Reyburg, 122 Pa. 299. In State v. Hutchinson, 72 Iowa, 561, which has been cited to the contrary of the rule laid down in the text, the question was whether the statute exempted intoxicating cider from the prohibition against sales of intoxicating liquor. The question whether the court would take notice of whether cider is or is not intoxicating was not passed upon, since there was positive evidence that the cider in question was intoxicating.

<sup>345</sup> Intoxicating Liquor Cases, 25 Kan. 751, 37 A. R. 284.

<sup>346</sup> Hansberg v. People, 120 Ill. 21, 23; Blatz v. Rohrbach, 116 N. Y. 450, 6 L. R. A. 669; State v. Sioux Falls Brew. Co., 5 S. D. 39, 45, 360, 26 L. R. A. 138. See Kerkow v. Bauer, 15 Neb. 150; Nevin v. Ladue, 3 Denio (N. Y.) 437. *Contra*, Watson v. State, 55 Ala. 158; Briffit v. State, 58 Wis. 39, 46 A. R. 621. Lager beer is judicially known to be intoxicating, however. State v. Goyette, 11 R. I. 592; State v. Church, 6 S. D. 89. *Contra*, People v. Hart, 24 How. Pr. (N. Y.) 289. But it is otherwise as to rice beer. Bell v. State, 91 Ga. 227. The term "malt liquor" is judicially known to include beer (Watson v. State, 55 Ala. 158; Welsh v. State, 126 Ind. 71, 9 L. R. A. 664. *Contra*, Netso v. State, 24 Fla. 363, 1 L. R. A. 825; State v. Beswick, 13 R. I. 211, 220), provided it be lager beer (Netso v. State, *supra*).

<sup>347</sup> Shaw v. State, 56 Ind. 188; People v. Rice, 103 Mich. 350, 353. The court takes judicial notice of the meaning of the term "malt liquor." Adler v. State, 55 Ala. 16, 23.

<sup>348</sup> Beebe v. State, 6 Ind. 501, 63 A. D. 391, 407.



produced for sale and consumption principally as a beverage;<sup>349</sup> but whether a person may recover from intoxication in five or six hours is not judicially known.<sup>350</sup>

### § 117. Religious affairs.

The courts take judicial notice of the well-known sects into which the religious world is divided, and of their more important differences;<sup>351</sup> but not of their general organization and administration,<sup>352</sup> nor of their laws and customs.<sup>353</sup> And various other matters affecting religion are noticed by the courts without evidence because of their notoriety.<sup>354</sup>

### § 118. Municipal affairs.

Judicial notice is taken of many things affecting municipal affairs. Thus, the courts will assume knowledge that benefits may be derived from a street improvement by property not fronting thereon;<sup>355</sup> that property on well-improved and well-kept streets is more desirable than property on other streets;<sup>356</sup>

<sup>349</sup> *Wynehamer v. People*, 13 N. Y. 378, 387.

<sup>350</sup> *Brannan v. Adams*, 76 Ill. 331, 336.

<sup>351</sup> *Smith v. Pedigo*, 145 Ind. 392, 32 L. R. A. 838; *Humphrey v. Burnside*, 4 Bush (Ky.) 215, 225; *Attorney General v. Dublin*, 38 N. H. 459, 513; *State v. Edgerton School Board*, 76 Wis. 177, 20 A. S. R. 41.

<sup>352</sup> *Sarahass v. Armstrong*, 16 Kan. 192; *Baxter v. McDonnell*, 155 N. Y. 83, 40 L. R. A. 670; *Hill Estate Co. v. Whittlesey*, 21 Wash. 142.

<sup>353</sup> *Youngs v. Ransom*, 31 Barb. (N. Y.) 49; *Katzer v. Milwaukee*, 104 Wis. 16.

<sup>354</sup> *Alden v. St. Peter's Parish*, 158 Ill. 631, 30 L. R. A. 232; *McAlister v. Burgess*, 161 Mass. 269, 24 L. R. A. 158; *Pfeiffer v. Detroit Board of Education*, 118 Mich. 560, 42 L. R. A. 536; *State v. South Kingstown Town Council*, 18 R. I. 258, 273, 22 L. R. A. 65. As to the Bible, see § 112, *supra*.

Judicial notice is taken by the courts of Utah that sealing for time and eternity according to the ceremonies of the Mormon church is a marriage ceremony. *Hilton v. Roylance*, 25 Utah, 129, 58 L. R. A. 723.

<sup>355</sup> *Hayes v. Douglas County*, 92 Wis. 429, 31 L. R. A. 213.

<sup>356</sup> *Reinken v. Fuehring*, 130 Ind. 382, 30 A. S. R. 247, 252.

that vaults are commonly constructed under sidewalks in front of business blocks;<sup>357</sup> that an undertaker's establishment is an offensive thing in a residence district;<sup>358</sup> and that dense black smoke emitted from a chimney may be a nuisance.<sup>359</sup> The finances of a particular city have also been judicially noticed in a general way,<sup>360</sup> and various other matters affecting the municipality.<sup>361</sup>

### § 119. Railroads.

Judicial notice is taken of the existence and location of the various railroads of importance in the state,<sup>362</sup> and that two roads touching the same points are parallel and competing lines.<sup>363</sup> The general features of the railroad business and the practical operation of railroads are also judicially noticed,<sup>364</sup> as that trains running on a particular road are usually controlled by the owners of the road,<sup>365</sup> and that telegraph lines are necessarily maintained in connection with railroads;<sup>366</sup> and

<sup>357</sup> *Babbage v. Powers*, 130 N. Y. 281, 14 L. R. A. 398.

<sup>358</sup> *Rowland v. Miller*, 139 N. Y. 93, 22 L. R. A. 182.

<sup>359</sup> *Moses v. U. S.*, 16 App. D. C. 428, 50 L. R. A. 532.

<sup>360</sup> *Davock v. Moore*, 105 Mich. 120, 28 L. R. A. 783; *Harrington v. Providence*, 20 R. I. 233, 38 L. R. A. 305.

<sup>361</sup> *Bienville Water-Supply Co. v. Mobile*, 112 Ala. 260, 57 A. S. R. 28; *Holmes v. Detroit*, 120 Mich. 226, 45 L. R. A. 121.

<sup>362</sup> *Texas & P. R. Co. v. Black*, 87 Tex. 160; *Gulf, C. & S. F. R. Co. v. State*, 72 Tex. 404, 13 A. S. R. 815. It is judicially known that a certain city within the court's territorial jurisdiction is a railroad terminus. *Smitha v. Flournoy's Adm'r*, 47 Ala. 345. It has been held, however, that the court cannot take judicial notice whether a certain road runs through a particular county. *Indianapolis & C. R. Co. v. Case*, 15 Ind. 42.

<sup>363</sup> *Gulf, C. & S. F. Ry. Co. v. State*, 2 Interst. Com. R. 335, 72 Tex. 404, 13 A. S. R. 815.

<sup>364</sup> *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477, 20 L. R. A. 822; *Cleveland, C., C. & St. L. R. Co. v. Jenkins*, 174 Ill. 398, 66 A. S. R. 296.

<sup>365</sup> *South & N. A. R. Co. v. Pilgreen*, 62 Ala. 305.

<sup>366</sup> *State v. Ind. & I. S. R. Co.*, 133 Ind. 69, 18 L. R. A. 502.

the general speed of trains is also known judicially.<sup>367</sup> It is judicially noticed that trains have the right of way over a grade crossing in preference to travelers on the highway;<sup>368</sup> and that an unprotected grade crossing is dangerous.<sup>369</sup> The custom of transferring cars<sup>370</sup> and of checking baggage<sup>371</sup> over connecting lines, the mode of shipping live stock,<sup>372</sup> the use of coupon mileage tickets,<sup>373</sup> and the usage in reference to tickets for berths in sleeping cars,<sup>374</sup> are also judicially noticed. The courts take official notice that the superintendent of a railroad has power to conduct its ordinary business transactions;<sup>375</sup> that passenger conductors are required to enter and leave their trains while in motion;<sup>376</sup> and that they have no authority to carry passengers without payment of the regular fare.<sup>377</sup> And judicial notice is taken also of the relation existing between conductor and brakeman;<sup>378</sup> and of the duties of brakemen with reference to ejecting trespassers from the train.<sup>379</sup>

Facts relating to street railroads are also recognized by the

<sup>367</sup> *Pearce v. Langfit*, 101 Pa. 507, 47 A. R. 737.

<sup>368</sup> *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274.

<sup>369</sup> *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 53 A. S. R. 557.

<sup>370</sup> *Louisville & N. R. Co. v. Boland*, 96 Ala. 626, 18 L. R. A. 260; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 31 A. S. R. 477, 489.

<sup>371</sup> *Isaacson v. New York C. & H. R. R. Co.*, 94 N. Y. 278, 46 A. R. 142, 145.

<sup>372</sup> *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165, 4 Am. Rep. 466, 473.

<sup>373</sup> *Eastman v. Chicago & N. W. R. Co.*, 39 Fed. 552.

<sup>374</sup> *Mann-Boudoir Car Co. v. Dupre*, 13 U. S. App. 183, 21 L. R. A. 289.

<sup>375</sup> *Sacalaris v. Eureka & P. R. Co.*, 18 Nev. 155, 51 A. R. 737.

<sup>376</sup> *Dalley v. Preferred Masonic Mut. Acc. Ass'n*, 102 Mich. 289, 299, 26 L. R. A. 171.

<sup>377</sup> *Condran v. Chicago, M. & St. P. R. Co.*, 32 U. S. App. 182, 28 L. R. A. 749.

<sup>378</sup> *Mason v. Richmond & D. R. Co.*, 111 N. C. 482, 32 A. S. R. 814, 823.

<sup>379</sup> *Farber v. Missouri P. R. Co.*, 116 Mo. 81, 20 L. R. A. 350.

courts without evidence if of sufficient notoriety. Thus, it is judicially known that street railroads are common carriers of passengers;<sup>380</sup> that passengers are allowed to ride on the platforms of the cars;<sup>381</sup> and that freight cars are run over some street railroads.<sup>382</sup>

To dispense with the necessity for evidence, however, the matter in question must be well known. To illustrate, the courts cannot take judicial notice of the history of particular lines of railroad;<sup>383</sup> nor that horse cars and cable cars require the same means of protection for operators as is required on electric cars;<sup>384</sup> nor that unprotected frogs and switches are inherently dangerous.<sup>385</sup> Nor can they take judicial notice of the effect of releasing, upon a grade, the brake of a car propelled only by momentum;<sup>386</sup> nor of the state of the art of burning coal so as to prevent sparks from escaping;<sup>387</sup> nor of the detailed duties of servants of a railroad company;<sup>388</sup> nor of the importance of the shipper's accompanying his live stock in transit.<sup>389</sup>

### § 120. Electricity.

Judicial notice will be taken of the existence and nature of

<sup>380</sup> *Donovan v. Hartford St. R. Co.*, 65 Conn. 201, 29 L. R. A. 297.

<sup>381</sup> *Metropolitan R. Co. v. Snashall*, 3 App. D. C. 420, 433.

<sup>382</sup> *Oren v. Pingree*, 120 Mich. 550, 46 L. R. A. 407.

<sup>383</sup> *Purdy v. Erie R. Co.*, 162 N. Y. 42, 48 L. R. A. 669.

<sup>384</sup> *State v. Nelson*, 52 Ohio St. 88, 26 L. R. A. 317.

<sup>385</sup> *Mo. P. R. Co. v. Lewis*, 24 Neb. 848, 2 L. R. A. 67.

<sup>386</sup> *Chicago, St. L. & P. R. Co. v. Champion*, 9 Ind. App. 510, 524, 53 A. S. R. 357, 368.

<sup>387</sup> *Garrett v. Southern R. Co.*, 101 Fed. 102, 49 L. R. A. 645.

<sup>388</sup> *Highland Ave. & B. R. Co. v. Walters*, 91 Ala. 435; *Southern R. Co. v. Hagan*, 103 Ga. 564; *McGowan v. St. Louis & I. M. R. Co.*, 61 Mo. 528, 532.

<sup>389</sup> *Atchison, T. & S. F. R. Co. v. Campbell*, 61 Kan. 439, 48 L. R. A. 251.

electricity,<sup>390</sup> and of many of its uses;<sup>391</sup> that an incandescent light is safer than the ordinary light;<sup>392</sup> and that electricity as a motive power for street cars has not superseded horses;<sup>393</sup> and various other matters more or less directly affecting electricity are known to the court without evidence.<sup>394</sup>

The court will not take official notice that electricity as used by street railroad companies as a motive power is dangerous;<sup>395</sup> nor will all the various methods of generating, transmitting, and using electricity be judicially recognized.<sup>396</sup>

### § 121. Banks and banking.

Many customs and usages relating to banks and banking are judicially recognized without evidence.<sup>397</sup> Thus, the courts take official notice of the general lien of bankers on securities deposited with them by their customers;<sup>398</sup> of the mode of withdrawing deposits from savings banks;<sup>399</sup> of the custom of allowing deposits to be checked out in parcels;<sup>400</sup> of the usage of checking against deposits of checks on other banks before collection thereof;<sup>401</sup> of the mode of making distant collections;<sup>402</sup> and of the practice of making renewals of customers' notes.<sup>403</sup>

<sup>390</sup> *Crawfordsville v. Braden*, 130 Ind. 149, 30 A. S. R. 214.

<sup>391</sup> *State v. Murphy*, 130 Mo. 10, 31 L. R. A. 798.

<sup>392</sup> *Crawfordsville v. Braden*, 130 Ind. 149, 30 A. S. R. 214.

<sup>393</sup> *Meyer v. Krauter*, 56 N. J. Law, 696, 24 L. R. A. 575.

<sup>394</sup> *People v. W. U. Tel. Co.*, 166 Ill. 15, 36 L. R. A. 637; *Wyant v. Cent. Tel. Co.*, 123 Mich. 51, 81 A. S. R. 155.

<sup>395</sup> *Taggart v. Newport St. R. Co.*, 16 R. I. 668, 7 L. R. A. 205.

<sup>396</sup> *Crawfordsville v. Braden*, 130 Ind. 149, 30 A. S. R. 214.

<sup>397</sup> *British & A. Mortg. Co. v. Tibballs*, 63 Iowa, 468.

<sup>398</sup> *Brandao v. Barnett*, 3 C. B. 519, 12 Clark & F. 787.

<sup>399</sup> *White v. Cushing*, 88 Me. 339, 51 A. S. R. 402, 405.

<sup>400</sup> *Munn v. Burch*, 25 Ill. 35.

<sup>401</sup> *Beal v. Somerville*, 5 U. S. App. 14, 17 L. R. A. 291.

<sup>402</sup> *Lee v. Chillicothe Branch Bank*, 1 Biss. 325, 331, Fed. Cas. No. 8,187; *Bowman v. First Nat. Bank*, 9 Wash. 614, 43 A. S. R. 870.

<sup>403</sup> *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338, 38 A. R. 434, 438.

The ordinary duties of the cashier of a bank are known to the court;<sup>404</sup> also, that some one besides the cashier has access to the funds, though it is not judicially known what officers and employes are required to conduct the business.<sup>405</sup> Judicial notice is taken also of the elements of value of a bank note.<sup>406</sup>

#### ART. IV. DISCRETION OF COURT.

§ 122. The court may take judicial notice of a fact without regard to the allegations of the pleadings concerning it,<sup>407</sup> and without waiting for counsel to bring the matter to the court's attention.<sup>408</sup> And so far as governmental matters are concerned, no estoppel or agreement of the parties concerning the fact can preclude the court from taking official notice of the truth and giving judgment accordingly.<sup>409</sup>

It is often said that whether or not a fact shall be judicially noticed is a question directed to the judge's discretion.<sup>410</sup> In so far as the term "discretion" is used here in its usual legal meaning of "power of a judge to decide in accordance with

<sup>404</sup> *Sturges v. Circleville Bank*, 11 Ohio St. 153, 78 A. D. 296.

<sup>405</sup> *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 340.

<sup>406</sup> *Jones v. Fales*, 4 Mass. 245, 252.

<sup>407</sup> *Jones v. U. S.*, 137 U. S. 202; *Brown v. Piper*, 91 U. S. 37, Thayer, Cas. Ev. 17, 20; *State v. Jarrett*, 17 Md. 309; *King County v. Ferry*, 5 Wash. 536, 34 A. S. R. 880, 897. See, however, *Partridge v. Strange*, Plowd. 77, 83, 84. Thus, a demurrer does not admit allegations of matter which the court judicially knows to be false. *Taylor v. Barclay*, 2 Sim. 213, Thayer, Cas. Ev. 23; *People v. Oakland Water Front Co.*, 118 Cal. 234, 244; *Southern R. Co. v. Covenia*, 100 Ga. 46, 62 A. S. R. 312; *Heaston v. Cincinnati & F. W. R. Co.*, 16 Ind. 275, 79 A. D. 430, 432; *Cooke v. Tallman*, 40 Iowa, 133; *Attorney-General v. Foote*, 11 Wis. 14, 78 A. D. 689.

<sup>408</sup> *Brown v. Piper*, 91 U. S. 37, Thayer, Cas. Ev. 17, 20; *Hunter v. New York, O. & W. R. Co.*, 116 N. Y. 615.

<sup>409</sup> *Tucker v. State*, 11 Md. 322.

<sup>410</sup> A like dictum appears in *Hunter v. New York, O. & W. R. Co.*, 116 N. Y. 615, 621.

his own judgment of the equities of the case, unhampered by inflexible rules of law,"<sup>411</sup> this statement is thought to be inaccurate and misleading, and is so often made, it is believed, through a confusion of the usual legal meaning of the term "discretion" with its general meaning of "opinion" or "judgment," in the broad sense of the two latter words.

When a disputed fact is presented to the court for judicial notice, three questions may arise: First. Is there a statute requiring the court, directly or indirectly, to take official notice of the fact? If so, the court will follow the legislative direction. Second. If no such statute exists, then the question arises, is the matter governed by precedent? If a precedent exists, and the course of time has not rendered it nugatory, the court will judicially notice the disputed fact or not, according to whether or not it was judicially noticed in the previously decided case. Third. If there is no precedent, or if a precedent exists, but is deemed to be of no force, then the question arises, is the disputed fact to be judicially noticed on principle? Now, as we have seen, there are two general principles that govern judicial notice: (1) Matters concerning the government are noticed, and (2) matters of common knowledge are noticed. The third question, then, has two branches: (a) Is the fact in dispute a matter of governmental concern? If so, the court will notice it without evidence. If it is not such a matter, then the second branch of the question presents itself, namely: (b) Is the disputed fact a matter of common knowledge? If so, the court will judicially notice it. Otherwise, the fact must be established by evidence.

It is with reference to the two branches of the third question that the court is said to exercise its "discretion." But "discretion," as the term is usually employed by lawyers, does not

<sup>411</sup> Cyc. Law Dict. "Discretion."

enter into the decision. If the disputed fact is one that concerns the government, the party desiring to take advantage of it has a right to insist that it shall be noticed without evidence. So, if the fact is one of common knowledge, this same right exists. The judge cannot say, "While this fact is one that concerns the government, or while this fact is a matter of notoriety, still, in this particular case, I do not think I ought to take judicial notice of it." Nor, on the other hand, may the judge say, "While this fact is not one that concerns the government, and while it is not a matter of notoriety, yet, in this particular case, I shall notice it without evidence." Each party litigant has his rights in the matter; and, once the character of the disputed fact is made to appear, the judge has no discretion as to exercising or not exercising the function of judicial notice. What the judge actually does in deciding the two branches of the third question is to exercise his "judgment," using the word in its broad sense, as to whether or not the disputed fact does in fact concern the government or is in fact a matter of notoriety. But this is not an exercise of "discretion," in the legal sense of the word; it is merely deciding the question according to the judge's individual opinion as to the character of the fact in dispute.

A distinction is sometimes made in this connection between facts of notoriety and facts of universal recognition. Notoriety may be used in two senses, it is said: First, it may denote universal acceptance in some branch of knowledge. This is said to be an improper use of the word. Second, it may denote presence in the mind of the entire community at the same time. This is said to be the only correct meaning of the word. No such limitation on the use of the term will be found in the dictionaries, nor have any cases been discovered in which it is made. Truly, there is a distinction between universal truths, such as facts connected with the sciences, the



arts, etc., and isolated facts of notoriety, such, for instance, as the great railroad strike of 1894. In either case, however, the principle of judicial notice is the same; the court can no more refuse to take judicial cognizance of one matter than of the other.

It may be observed, in closing, that it is often a delicate question whether a given fact is or is not so well known as to be a proper subject of judicial notice. It should not be a matter of surprise, therefore, if, in answering the question, different courts should come to different conclusions. Moreover, what forms today a matter for positive evidence may tomorrow have become notorious, so that the court may well take cognizance of it without evidence. As to this borderland of knowledge, the law of judicial notice is in a formative state, the same as are the various subjects to which it relates.<sup>412</sup>

#### ART. V. PRELIMINARY INVESTIGATION BY COURT.

Sources of information, § 123.

Procedure as to investigation, § 124.

#### § 123. Sources of information.

Judicial knowledge on the part of the judge is in many cases a fiction, so far as it implies that he actually knows the truth of the fact at the time the question arises; but to enable him to give effect to the principle of judicial notice he may, if need be, take time for private study, and refer to any proper source to get the desired information.<sup>413</sup> Thus, if a

<sup>412</sup> See § 109, *supra*, as to notoriety.

<sup>413</sup> *Maps*. Hoyt v. Russell, 117 U. S. 401, 405.

*Public records*. Cary v. State, 76 Ala. 78, 84. *Contra*, Williams v. Langevin, 40 Minn. 180.

*Charters and grants*. State v. Wagner, 61 Me. 178, 186.

*Mortality tables*. Scheffler v. Minneapolis & St. L. R. Co., 32 Minn. 518.

question arises of the existence of a statute, or of the time when a statute takes effect, or of its precise terms, the judge may resort to any source of information which is in its nature capable of conveying to the judicial mind a clear and satisfactory answer to the question,—always resorting first to that which is in its nature most appropriate, unless the then positive law prescribes a different rule.<sup>414</sup>

The sources to which the judge may resort for information concerning a fact which he is bound to notice judicially are sometimes specified by statute, as where the legislature declares that a certain edition of the laws of the country is competent

*Time piece.* See *People v. Constantino*, 153 N. Y. 24.

The almanac is commonly referred to by the courts, and in modern times little or no regard is paid to the authority under which it is published. Even the common advertising almanac has been used. *Page v. Faucet*, Cro. Eliz. 227; *Allman v. Owen*, 31 Ala. 167; *People v. Mayes*, 113 Cal. 618; *People v. Chee Kee*, 61 Cal. 404; *Case v. Perew*, 46 Hun (N. Y.) 57.

The court may apply for information to the proper department of the government, such as the foreign office in England, and the state or navy department in the United States. *Taylor v. Barclay*, 2 Sim. 213, *Thayer*, Cas. Ev. 23; *The Charkieh*, 42 Law J. Adm. 17; *Foster v. Globe Venture Syndicate*, 69 Law J. Ch. 375 [1900] 1 Ch. 811, 82 Law T. 253; *The Paquete Habana*, 175 U. S. 677; *Jones v. U. S.*, 137 U. S. 202.

Dictionaries are commonly referred to for the meaning of words and phrases. *Adler v. State*, 55 Ala. 16; *Briffit v. State*, 58 Wis. 39, 46 A. R. 621.

Histories may be consulted. *The Montello*, 11 Wall. (U. S.) 411, 414; *Attorney General v. Dublin*, 38 N. H. 459, 515; *Swinerton v. Columbian Ins. Co.*, 37 N. Y. 174, 93 A. D. 560. And the same is true of books of science and reference books in general. *The Montello*, supra; *Lyon v. U. S.*, 8 U. S. App. 409, 412; *Carey v. Reeves*, 46 Kan. 571.

The court is not confined to books in its search for information, but may inquire of men learned in the particular branch of knowledge. *Willoughby v. Willoughby*, 1 Term R. 763, 772; *Rogers v. Cady*, 104 Cal. 288, 290, 43 A. S. R. 100, 102.

<sup>414</sup> *Gardner v. Collector*, 6 Wall. (U. S.) 499; *Barranger v. Baum*, 103 Ga. 465; *Hall v. Brown*, 58 N. H. 93, 95; *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 52 A. S. R. 890.

evidence of its contents, without further proof or authentication. So far as the edition embraces general or public laws, which the judge is bound, even in the absence of such a statute, to notice judicially, the sources to which he may look to ascertain those laws are pro tanto fixed, and his discretion in selecting and rejecting sources of information is pro tanto restricted. While he may not be limited to the statutory source alone, yet the source there specified may not be rejected.<sup>415</sup>

§ 124. Procedure as to investigation.

The judge may compel counsel to aid him in the search for information,<sup>416</sup> by the production of evidence or otherwise, and may refuse to take judicial notice of the disputed fact until its truth is made to appear to his satisfaction.<sup>417</sup>

The preliminary investigation conducted by the court is not a part of the trial of the issues of the action.<sup>418</sup> It is merely an extrajudicial proceeding by which the judge qualifies himself to fulfill the duties of his office; and this is so, even though counsel aid him in the search, and he in form receives evidence as to the truth of the matter in dispute. From this, two things follow: First, in receiving evidence as to the truth of the fact, the court is not bound by the various rules that govern the introduction of evidence in the trial proper;<sup>419</sup> second, the right and duty of deciding the

<sup>415</sup> Thayer, *Prel. Treat. Ev.* 306.

<sup>416</sup> Stephen, *Dig. Ev.* art. 59; Thayer, *Prel. Treat. Ev.* 308; Chandler v. Grieves, 2 H. Bl. 606, note; Doe d. Williams v. Lloyd, 1 Man. & G. 671, 685.

<sup>417</sup> Van Omeron v. Dowick, 2 Camp. 42, 44 (semble); School Dist. v. Ins. Co., 101 U. S. 472; Hall v. Brown, 58 N. H. 93, 95. See § 131, *infra*, for an outline of the procedure on this preliminary investigation.

<sup>418</sup> Rogers v. Cady, 104 Cal. 288, 290, 43 A. S. R. 100, 102; State v. Morris, 47 Conn. 179.

truth of the fact devolves, not on the jury, but on the court. Issue cannot be taken on a matter that forms a proper subject of judicial notice, and the court should not submit the question to the jury. The decision of it is a question for the court alone, and the jury must obey the court's instructions in regard to it.<sup>420</sup> Nor is the rule altered by the fact that the information sought by the judge is laid before him in the way of the ordinary trial, in the presence of the jury, and without any distinct ruling that it is designed for the court alone.<sup>421</sup>

#### ART. VI. PRIVATE KNOWLEDGE OF COURT.

§ 125. The judge before whom a case is heard may not take advantage of his private knowledge of the facts in issue. If he has personal knowledge of the facts, it is his duty to retire from the trial and testify as a witness. Nor may either of the parties take advantage of the judge's private knowledge of the facts of the case. If those facts are not a proper subject of judicial notice, they must be proved, the same as if the judge had no knowledge of their existence.<sup>422</sup> The

<sup>419</sup> Thayer, Prel. Treat. Ev. 280, note; *People v. Chee Kee*, 61 Cal. 404; *State v. Main*, 69 Conn. 123, 136, 61 A. S. R. 30, 40.

<sup>420</sup> *Highland Ave. & B. R. Co. v. Walters*, 91 Ala. 435; *Rogers v. Cady*, 104 Cal. 288, 43 A. S. R. 100; *State v. Main*, 69 Conn. 123, 136, 137, 61 A. S. R. 30, 40, 41; *Hale v. N. J. Steam Nav. Co.*, 15 Conn. 539, 39 A. D. 398, 405; *Southern R. Co. v. Covenia*, 100 Ga. 46, 62 A. S. R. 312; *Attorney General v. Foote*, 11 Wis. 14, 78 A. D. 689. See § 129, *infra*, as to instructions. The truth of this was early recognized. 3 Bl. Comm. 333; *Page v. Faucet*, Cro. Eliz. 227.

<sup>421</sup> *State v. Wagner*, 61 Me. 178, 186.

<sup>422</sup> *Rex v. Gouge*, 3 Bulst. 115; *Detroit W. T. & J. R. Co. v. Crane*, 50 Mich. 182; *State v. Edwards*, 19 Mo. 674; *State v. Lincoln Gas Co.*, 38 Neb. 33, 38; *Moses v. Julian*, 45 N. H. 52, 84 A. D. 114, 116, 122; *Wheeler v. Webster*, 1 E. D. Smith (N. Y.) 1; *Marks v. Sullivan*, 8 Utah, 406, 20 L. R. A. 590, 593. This rule is expressed in the maxim, *Non refert quid notum sit iudici, si notum non sit in forma iudicii*.

same principle applies to appellate judges. A court of review cannot act on the private and extrajudicial knowledge of its individual members as to the facts of the case.<sup>423</sup> An exception to the rule here announced exists in the case of a proceeding for contempt of court. In such a case, the judge may take notice, without evidence, of pertinent facts which came within the cognizance of his own senses.<sup>424</sup> And another exception occurs with reference to preliminary questions which are for the determination of the court alone. Thus, the judge may resort to his personal knowledge on a question whether a signature has been sufficiently proved to render the writing to which it is appended admissible in evidence.<sup>425</sup>

#### ART. VII. KNOWLEDGE OF JURORS.

Private knowledge, § 126.

Judicial knowledge, § 127.

#### § 126. Private knowledge.

In former times, jurors were selected because of their peculiar knowledge of the facts of the case, so that they might render a just verdict, even though no evidence, in the modern sense of the word, should be introduced.<sup>426</sup> This is no longer the case; personal knowledge of the facts may disqualify a juror. If he has such knowledge, and the *voir dire* does not disclose it, he should inform the court, so that he may be sworn and testify as a witness. Otherwise, his knowledge does not receive that legal scrutiny to which all evidence is

The judge may take judicial notice of his own official acts in the case before him. See note 93, *supra*.

<sup>423</sup> *New Orleans v. Ripley*, 5 La. 121, 25 A. D. 175.

<sup>424</sup> *Myers v. State*, 46 Ohio St. 473, 15 A. S. R. 638.

<sup>425</sup> *Brown v. Lincoln*, 47 N. H. 468.

<sup>426</sup> *Thayer*, *Prel. Treat. Ev.* 170, 296; 3 *Bl. Comm.* 374; *Schmidt v. N. Y. U. M. F. Ins. Co.*, 1 *Gray (Mass.)* 529, 535, 536.

justly subjected; the right of cross-examination is lost, and it cannot be known upon what foundation the verdict rests. If the juror does not follow this course, and, in arriving at a verdict, acts upon his private knowledge, the verdict is void and may be set aside.<sup>427</sup>

### § 127. Judicial knowledge.

Modern jurors thus being judicial officers, bound to act only upon the evidence adduced at the trial, the principle of judicial notice, so far as matter of common knowledge is concerned, applies also to them. The fact that they are a tribunal subordinate to the court does not change the nature of their office; it merely subjects them in many respects to the direction of the judge. They have the same right as the court to act upon facts going to make up the common stock of human knowledge, and they are subject, with respect to the exercise of that right, to the same restrictions as the court.<sup>428</sup> This position is unquestionable so far as it con-

<sup>427</sup> Thayer, *Prel. Treat. Ev.* 170, 296; *Parks v. Ross*, 11 How. (U. S.) 362, 373; *Head v. Hargrave*, 105 U. S. 45, 49; *Chattanooga, R. & C. R. Co. v. Owen*, 90 Ga. 265; *Ottawa G. L. & C. Co. v. Graham*, 28 Ill. 73, 81 A. D. 263; *Chicago, R. I. & P. R. Co. v. Spring Hill Cemetery Ass'n*, 9 Kan. App. 882; *State v. Me. Cent. R. Co.*, 86 Me. 309, 312; *Patterson v. Boston*, 20 Pick. (Mass.) 159, 166; *Schmidt v. N. Y. Union M. F. Ins. Co.*, 1 Gray (Mass.) 529, 535; *Woodbury v. Anoka*, 52 Minn. 329; *Lenahan v. People*, 3 Hun (N. Y.) 164, 5 Thomp. & C. 265; *State v. Perry*, 121 N. C. 533, 61 A. S. R. 683; *State v. Gaymon*, 44 S. C. 333, 51 A. S. R. 861; *Dunbar v. Parks*, 2 Tyler (Vt.) 217; *Peppercorn v. Black River Falls*, 89 Wis. 38, 46 A. S. R. 818.

<sup>428</sup> Thayer, *Prel. Treat. Ev.* 296; *U. S. v. Burns*, 5 McLean, 23, Fed. Cas. No. 14,691; *Chicago, B. & Q. R. Co. v. Warner*, 108 Ill. 538, 546; *McCormick Harvesting Mach. Co. v. Jacobson*, 77 Iowa, 582; *State v. Me. Cent. R. Co.*, 86 Me. 309; *Com. v. Peckham*, 2 Gray (Mass.) 514, Thayer, *Cas. Ev.* 17; *Huntress v. Boston & M. R. Co.*, 66 N. H. 185, 49 A. S. R. 600, 602; *Lenahan v. People*, 3 Hun (N. Y.) 164, 167, 5 Thomp. & C. 265.

cerns matters of which the court itself has taken judicial notice, and of whose existence it has accordingly informed the jury by instruction. In such a case, as we have seen,<sup>429</sup> the jury are bound to obey the court's direction. As to matters concerning which the instructions are silent, there is some question. It would seem, however, that the failure of the court to refer to a matter of common knowledge in the instructions should not deprive the jury of the right to take notice of it in determining the weight and effect of the evidence;<sup>430</sup> but that of material facts not affecting merely the weight and effect of the evidence, the jury cannot take notice without special instructions.<sup>431</sup> This much, however, is certain: While the law does not permit a juror to act upon the existence of a particular fact known only to himself, and not a matter of common observation or general knowledge, yet it permits him,—even requires him,—in determining the force and effect of the evidence adduced in the trial, to apply his general knowledge and experience. He is not bound to regard the evidence precisely as given, but must consider its truth and weight by his knowledge of men and the common affairs of life.<sup>432</sup>

<sup>429</sup> See § 124, *supra*.

<sup>430</sup> *Bradford v. Cunard S. S. Co.*, 147 Mass. 55; *Lillibridge v. McCann*, 117 Mich. 84, 72 A. S. R. 553, 555; *Huntress v. Boston & M. R. Co.*, 66 N. H. 185, 49 A. S. R. 600; *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 322, 66 A. S. R. 754, 757; *Gunn v. Ohio River R. Co.*, 36 W. Va. 165, 32 A. S. R. 842.

<sup>431</sup> *Illinois C. R. Co. v. Greaves*, 75 Miss. 360.

<sup>432</sup> *Lafayette Bridge Co. v. Olson*, 108 Fed. 335, 47 C. C. A. 367, 54 L. R. A. 33; *Stevens v. State*, 3 Ark. 66; *Ottawa Gas Light & C. Co. v. Graham*, 28 Ill. 73, 81 A. D. 263, 265; *Hopkinson v. Knapp & S. Co.*, 92 Iowa, 328; *State v. Maine Cent. R. Co.*, 86 Me. 309; *Schmidt v. New York U. Mut. Fire Ins. Co.*, 1 Gray (Mass.) 529, 536; *Manning v. West End St. R. Co.*, 166 Mass. 230, 231; *Lamoureux v. New York, N. H. & H. R. Co.*, 169 Mass. 338; *Reynolds v. New York Cent. & H. R.*

In consonance with these principles, it has been held that the jury may apply their general knowledge and experience in assessing damages,<sup>433</sup> but that they cannot reject the evidence of competent witnesses, and rely altogether on their own judgment in making up the verdict;<sup>434</sup> that they may assume knowledge of matters affecting every man's credibility,<sup>435</sup> but that they cannot apply their private knowledge of facts affecting the character of a particular witness;<sup>436</sup>

R. Co., 58 N. Y. 248, 252; *Willis v. Lance*, 28 Or. 371. *Contra*, *Burrows v. Delta Transp. Co.*, 106 Mich. 582, 29 L. R. A. 468, 474. In the absence of all evidence upon a material, isolated, and non-notorious fact, however, the jury cannot arrive at a verdict upon mere inference, conjecture, and personal experience. *Sherman v. Menominee R. L. Co.*, 77 Wis. 14.

<sup>433</sup> *Head v. Hargrave*, 105 U. S. 45, 49; *Houston v. State*, 13 Ark. 66; *Ottawa Gas Light & C. Co. v. Graham*, 28 Ill. 73, 81 A. D. 263, 265; *Green v. Chicago*, 97 Ill. 370; *Springfield Consol. R. Co. v. Hoeffner*, 175 Ill. 634; *Schmidt v. New York Union Mut. Fire Ins. Co.*, 1 Gray (Mass.) 529, 535; *Patterson v. Boston*, 20 Pick. (Mass.) 159; *Parks v. Boston*, 15 Pick. (Mass.) 198; *Houston & T. C. R. Co. v. Dumas* (Tex. Civ. App.) 43 S. W. 609. In Massachusetts, the court has gone so far as to hold that, in an action for personal injuries, the plaintiff may recover for expenditures for medical attendance, without proving a definite sum, the jury being allowed to use their own knowledge of the charges ordinarily made by physicians in determining the amount to be allowed. *McGarrahan v. New York, N. H. & H. R. Co.*, 171 Mass. 211. And they may assess damages for described injury to goods of a certain value, even though there is no evidence as to the precise amount of the damage. *Bradford v. Cunard S. S. Co.*, 147 Mass. 55.

<sup>434</sup> *Peoria Gas Light & Coke Co. v. Peoria Terminal R. Co.*, 146 Ill. 372, 21 L. R. A. 373. *Contra*, *Bee Print. Co. v. Hichborn*, 4 Allen (Mass.) 63.

<sup>435</sup> *Jenney Elec. Co. v. Branham*, 145 Ind. 314, 33 L. R. A. 395. See *Daggers v. Van Dyck*, 37 N. J. Eq. 130, 132.

<sup>436</sup> *Chattanooga, R. & C. R. Co. v. Owen*, 90 Ga. 265; *Schmidt v. New York U. Mut. Fire Ins. Co.*, 1 Gray (Mass.) 529; *Donston v. State*, 6 Humph. (Tenn.) 274; *Johnson v. Superior R. T. R. Co.*, 91 Wis. 233. *Contra*, *State v. Jacob*, 30 S. C. 131, 14 A. S. R. 897; *McKain v. Love*, 2 Hill (S. C.) 506, 27 Am. Dec. 401.



and that, in a trial for making a seditious speech, they may take into consideration what they know of the state of the country and of society generally at the time the language was used, but that they cannot, without evidence, take into consideration particular facts attending the particular meeting at which the words were spoken.<sup>437</sup>

#### ART. VIII. EFFECT OF JUDICIAL NOTICE.

Necessity for evidence, § 128.

Instructions, § 129.

Argument of counsel, § 130.

#### § 128. Necessity for evidence.

The principal effect of the doctrine of judicial notice is that it dispenses with the necessity of proving the fact of which the court takes judicial cognizance.<sup>438</sup> Indeed, this is the single and limited object of the principle. It does not dispense with requirements of form which regulate the mode

<sup>437</sup> Best, Ev. § 254, citing *Regina v. Jones*, Centr. Cr. Ct. R. (1841) MS.

<sup>438</sup> Thayer, Prel. Treat. Ev. 277; *Crowford v. Blisse*, 2 Bulst. 150; *Gady v. State*, 83 Ala. 51; *Neville v. Kenney*, 125 Ala. 149; *People v. Chee Kee*, 61 Cal. 404; *Sturdevant's Appeal*, 71 Conn. 392, Thayer, Cas. Ev. 95, 96; *State v. Main*, 69 Conn. 123, 61 A. S. R. 30; *Gunning v. People*, 189 Ill. 165, 167, 82 A. S. R. 433, 435; *Secrist v. Petty*, 109 Ill. 188; *Chicago, B. & Q. R. Co. v. Warner*, 108 Ill. 538, 546; *State v. Downs*, 148 Ind. 324; *State v. Chingren*, 105 Iowa, 169; *State v. Intoxicating Liquors*, 73 Me. 278; *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.) 1; *State v. Scott*, 59 Neb. 499; *Wilson v. Van Leer*, 127 Pa. 371, 14 A. S. R. 854; *Searls v. Knapp*, 5 S. D. 325, 49 A. S. R. 873; *Austin v. State*, 101 Tenn. 563, 7 A. S. R. 703; *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336.

There is no necessity for a finding as to the existence of a matter which is a proper subject of judicial notice. *Steets v. New York El. R. Co.*, 79 Hun (N. Y.) 288.

Facts of which the court will take judicial notice need not be pleaded. *Green v. Tidball*, 26 Wash. 338, 55 L. R. A. 879.

of bringing controversies into court, and of stating and conducting them; much less with rules of substantive law. It is a rule concerning evidence merely.<sup>439</sup>

While evidence of a fact which forms a proper subject of judicial notice is not necessary, yet if the court permits or requires evidence of it, and evidence is accordingly introduced and the fact established, the error is ordinarily harmless.<sup>440</sup>

### § 129. Instructions.

Judicial notice being a conclusive recognition of the fact in question, it follows that the court may instruct the jury that the fact exists,<sup>441</sup> and, as has been seen, the jury are bound by the instruction.<sup>442</sup>

### § 130. Argument of counsel.

It follows, also, that, in so far as facts of which judicial notice is taken relate to matter within the province of the jury,<sup>443</sup> they may be commented on by counsel in the argument to the jury.<sup>444</sup> Thus, counsel may, in the course of the

<sup>439</sup> Thayer, *Prel. Treat. Ev.* 281; *Y. B. 7 Edw. III.* 4, 7; *Mackelley's Case*, 9 *Coke*, 65a, 67; *Id.*, 9 *Coke*, 62; *Neville v. Kenney*, 125 *Ala.* 149. See, however, preceding note as to pleading and findings.

<sup>440</sup> *Gormley v. Bunyan*, 138 *U. S.* 623, 635; *People v. Chee Kee*, 61 *Cal.* 404; *Jackson County v. State*, 147 *Ind.* 476, 497; *Downing v. Miltonvale*, 36 *Kan.* 740, 741; *Case v. Perew*, 46 *Hun (N. Y.)* 57. See note 18, *supra*, for more authorities.

<sup>441</sup> Thayer, *Prel. Treat. Ev.* 302; *King v. Sutton*, 4 *Maule & S.* 532, 542; *Adler v. State*, 55 *Ala.* 16; *Foley v. Cal. Horseshoe Co.*, 115 *Cal.* 184, 56 *A. S. R.* 87; *Swales v. Grubbs*, 126 *Ind.* 106; *State v. Means*, 95 *Me.* 364, 85 *A. S. R.* 421; *Pearce v. Langftt*, 101 *Pa.* 507, 47 *A. R.* 737. See *People v. Constantino*, 153 *N. Y.* 24.

<sup>442</sup> See § 124, *supra*.

<sup>443</sup> *Sullivan v. Royer*, 72 *Cal.* 248, 1 *A. S. R.* 51; *Richmond's Appeal*, 59 *Conn.* 226, 21 *A. S. R.* 85.

<sup>444</sup> Thayer, *Prel. Treat. Ev.* 302; *Jackson v. Com.*, 100 *Ky.* 239, 66 *A. S. R.* 336; *State v. Marsh*, 70 *Vt.* 288. If counsel, in the argument, misstates a matter of which the court takes judicial cognizance, the

argument, show by reference to the almanac, even though none has been introduced in evidence, the falsity of testimony that a certain day of the month in a given year fell on a specified day of the week.<sup>445</sup>

#### ART. IX. IMPEACHMENT OF JUDICIAL KNOWLEDGE.

§ 131. The dispute in reference to judicial notice usually lies, not in the fact's existence, but in whether or not the party wishing to take advantage of the fact must establish it by evidence; that is, whether the fact is a proper subject of judicial notice. But this is not always the case; it often happens that the truth of the fact is disputed. In this event a preliminary question presents itself to the court, viz.: Assuming that the matter is a proper subject of judicial notice, what is the truth of it? Theoretically, the judge is presumed to know the truth, but, it is needless to say, his knowledge is often inadequate. He may accordingly, as we have seen,<sup>446</sup> inform himself by reference to books or other proper source, with or without the aid of counsel, as he may choose. If this preliminary investigation is conducted in court with the aid of counsel, it usually proceeds as a part of the trial proper, in the course of which the books or other sources of information are introduced in evidence.<sup>447</sup> When the judge deems himself sufficiently well informed, he closes the inves-

error should be corrected by instruction. *Proctor v. De Camp*, 83 Ind. 559; *State v. O'Keefe*, 23 Nev. 127, 62 A. S. R. 768.

<sup>445</sup> *Wilson v. Van Leer*, 127 Pa. 371, 14 A. S. R. 854.

<sup>446</sup> See § 123, *supra*.

<sup>447</sup> Thus, to introduce these things in evidence is an unnecessary course, since the court has full power to examine them without it (see §§ 123, 128, *supra*). At the same time, it is a harmless course (see cases cited in notes 18, 440, *supra*), provided that it be borne in mind that this preliminary investigation is no part of the trial proper (see § 124, *supra*).

tigation, and exercises his function of taking judicial notice of the truth of the matter in dispute. Having done this, the trial proper proceeds.

Now, when the court has assumed judicial knowledge of a fact, to introduce evidence of that fact is a work of supererogation.<sup>448</sup> But the question has been put, May a party dispute the truth of a matter that forms a proper subject of judicial notice? In theory, and generally in actual practice, this question is addressed to the preliminary investigation just discussed. If a party has anything to say as to the truth of the fact, the time to speak is when the question of taking judicial notice of the fact is first broached. Accordingly, in this preliminary inquiry, counsel often offer evidence (in the broad sense of the term) which has a bearing on the question in hand. The extent to which this may be done lies in the discretion of the judge, who may be supposed to know when he is sufficiently well informed. If the judge deems himself secure in his own knowledge when the question first arises, he may dispense with the preliminary investigation as a whole, and decide the matter at once. And even where he desires information, yet he is not bound to call on counsel for it, nor have counsel a right to insist on being let into the investigation.<sup>449</sup> It follows from what has been said that, in theory at least, a fact which forms a proper subject of judicial notice may not be disputed by evidence in the trial proper.<sup>450</sup>

<sup>448</sup> See § 128, *supra*.

<sup>449</sup> The court may resort to any source of information which he deems proper. See § 123, *supra*.

<sup>450</sup> *Shore v. Wilson*, 9 Clark & F. 355, 569; *White v. Rankin*, 90 Ala. 541; *Stanley v. McElrath* (Cal.) 22 Pac. 673; *Luce v. Dorchester M. F. Ins. Co.*, 105 Mass. 297, 7 A. R. 522; *Com. v. Marzynski*, 149 Mass. 68, 72; *Attorney General v. Dublin*, 38 N. H. 459, 514. See *State v. Main*, 69 Conn. 123, 136, 61 A. S. R. 30, 39. And see cases cited in note 438, *supra*. *Contra*, *Thayer*, *Prel. Treat. Ev.* 308. Neither may

Whether or not a fact of which judicial notice is proposed to be taken may be impeached in the preliminary investigation rests, as we have seen, in the discretion of the court. The existence of some facts is so obvious that to permit an attempt to disprove them would be an absurd waste of time, as that firearms are not drugs or medicines. Other facts are not so obvious, as that a seal purporting to be the great seal of a state is such in fact. In the former instance no court would allow a party to impeach the fact.<sup>451</sup> In the latter case, however, evidence that the seal is not genuine would unquestionably be admitted.<sup>452</sup>

#### ART. X. JUDICIAL NOTICE ON APPEAL.

§ 132. The failure or the refusal of the trial court to take judicial notice of a fact does not preclude the appellate court from doing so. The court of review will take notice of and give proper effect to anything that might have been judicially noticed at the trial;<sup>453</sup> and this is so, even though the matter was not brought to the trial court's attention.<sup>454</sup> For example, the court of review will take official notice of the public stat-

such a fact be disputed on the hearing of a motion for a new trial. *People v. Mayes*, 113 Cal. 618.

<sup>451</sup> *Com. v. Marzynski*, 149 Mass. 68, 72.

<sup>452</sup> *Thayer*, *Prel. Treat. Ev.* 308.

<sup>453</sup> *Jones v. Merchants' Nat. Bank*, 33 U. S. App. 703, 35 L. R. A. 698; *People v. Mayes*, 113 Cal. 618, 626; *Rogers v. Cady*, 104 Cal. 288, 290, 43 A. S. R. 100, 102. It would seem to follow from this that the lower court's refusal to admit evidence of a fact of which it should have taken, but did not take, judicial notice, would be harmless error. *Contra*, it seems, *White v. Phoenix Ins. Co.*, 83 Me. 279, 281.

<sup>454</sup> *Brown v. Piper*, 91 U. S. 37, *Thayer*, *Cas. Ev.* 17, 20; *Hunter v. New York, O. & W. R. Co.*, 116 N. Y. 615. The rule is otherwise where the appellate court does not have the findings before it for review, and so have power to pass upon the facts. *Wood v. North Western Ins. Co.*, 46 N. Y. 421.

utes of the state wherein the trial occurred, even though they were not mentioned in the court below.<sup>455</sup>

The reviewing court will take judicial notice of anything that the court of first instance must have judicially noticed, even though it be a matter of which courts of general jurisdiction do not have official knowledge. Thus, while courts do not, as a rule, take judicial notice of municipal ordinances, yet, courts of the municipality being bound to do so, the same rule will govern the tribunal that reviews the judgment of the municipal court.<sup>456</sup>

A court of review will not take official notice of matters of which the court whose judgment is being reviewed could not have taken notice.<sup>457</sup> For instance, although the federal courts will, as a rule, assume knowledge of the laws of the various states of the Union, yet the supreme court of the United States, in reviewing the judgment of a state court, will not take notice of the law of a sister state, since the state court could not have taken cognizance of it.<sup>458</sup> However, if a public statute affecting the rights of the parties is enacted or repealed pending an appeal, the appellate court will take notice thereof, and give judgment accordingly.<sup>459</sup>

The presumption is, on appeal, that the knowledge of a fact as judicially assumed by the trial court is correct.<sup>460</sup>

In reviewing a cause brought before it by writ of error or

<sup>455</sup> *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 751.

<sup>456</sup> *Solomon v. Hughes*, 24 Kan. 211; *Steenerson v. Great Northern R. Co.*, 69 Minn. 353, 377 (semble).

<sup>457</sup> *Thomson-Houston Elec. Co. v. Palmer*, 52 Minn. 174, 178.

<sup>458</sup> *Hanley v. Donoghue*, 116 U. S. 1, Thayer, Cas. Ev. 26; *Lloyd v. Matthews*, 155 U. S. 222; *Sammis v. Wightman*, 31 Fla. 10 (semble). It is otherwise if the state court took notice of the law of a sister state. *Renaud v. Abbott*, 116 U. S. 277.

<sup>459</sup> *Vance v. Rankin*, 194 Ill. 625, 88 A. S. R. 173; *Wikel v. Jackson County*, 120 N. C. 451.

<sup>460</sup> *People v. Mayes*, 113 Cal. 618.

by appeal, the court of last resort cannot take official notice of the record of the cause in the lower court. It must be presented by transcript.<sup>461</sup> An appellate court will take judicial cognizance of its own record in the same cause on a former appeal.<sup>462</sup> It will not, however, take official notice of other cases, though in the same court, unless they are made a part of the record in the case in hand.<sup>463</sup>

It has already been seen that judicial notice is not taken of the rules of inferior courts,<sup>464</sup> nor of members of the bar of an inferior court,<sup>465</sup> though the judges of courts of general jurisdiction are noticed by the appellate courts,<sup>466</sup> and also the nature of the jurisdiction and the terms of the court whose judgment is under review.<sup>467</sup>

That the judges of appellate tribunals cannot make use of their private knowledge of facts bearing on the case before the court has been shown in another connection.<sup>468</sup>

<sup>461</sup> *Bush v. Tecumseh Nat. Bank*, 64 Neb. 451.

<sup>462</sup> *Dawson v. Dawson*, 29 Mo. App. 521; *Brucker v. State*, 19 Wis. 539.

<sup>463</sup> *Enix v. Miller*, 54 Iowa, 551; *Monticello Nat. Bank v. Bryant*, 13 Bush (Ky.) 419; *Banks v. Burnam*, 61 Mo. 76; *Maxwell v. Griffith*, 20 Wash. 106. The court cannot judicially notice whether the subject-matter of two separate suits is the same. *Loomis v. Griffin*, 78 Iowa, 482. The appellate court cannot take notice of the record of another case in the lower court. *People v. De la Guerra*, 24 Cal. 73, 78.

<sup>464</sup> See § 99(c), *supra*.

<sup>465</sup> See § 99(d), *supra*.

<sup>466</sup> See § 99(d), *supra*.

<sup>467</sup> See § 99(a), *supra*.

<sup>468</sup> See § 125, *supra*.

## **CHAPTER III.**

### **JUDICIAL ADMISSIONS.**

#### **ART. I. GENERAL CONSIDERATIONS.**

#### **ART. II. EFFECT IN FIRST TRIAL.**

#### **ART. III. EFFECT IN SECOND TRIAL.**

#### **ART. IV. CONSTRUCTION OF ADMISSION—INTRODUCTION OF ENTIRE WRITING.**

#### **ART. V. WITHDRAWAL OF ADMISSION.**

#### **ART. I. GENERAL CONSIDERATIONS.**

§ 133. Admissions are of two sorts: (1) Those deliberately and formally made, usually for some purpose connected with litigation, and (2) those otherwise made. The latter may be either express or implied from conduct; and this class of admissions includes confessions of persons accused of crime.

Admissions of the first sort are known as formal, ceremonial, solemn, or judicial admissions. With regard to their effect, they fall into two classes, according to the proceeding in which they are sought to be used. If made for the purpose of a trial, they are generally binding on the party making them for the purpose of that trial, and the opposing party is relieved of the necessity otherwise resting on him of adducing evidence of the existence of the fact admitted. In an independent proceeding, however, they do not have this conclusive effect. They do not absolutely dispense with the necessity of adducing evidence of the fact admitted, but are merely admissible as evidence of that fact, as tending to show its probable existence. In this aspect they have the same effect as



nonjudicial or informal admissions generally. They do not dispense with evidence; they merely constitute evidence.

A judicial admission may therefore affect the necessity of adducing evidence or it may in itself constitute evidence. With their latter phase we are not presently concerned, since this division of the subject of evidence is devoted, not to rules of evidence in the strict sense of that term, but to rules fixing or dispensing with the necessity of adducing evidence.

#### ART. II. EFFECT IN FIRST TRIAL.

Admissions in proceedings preliminary to trial, § 134.

Admissions in pleadings, § 135.

(a) Admissions as defining the issues.

(b) Admissions as evidence.

Admissions in agreed facts and in open court, § 136.

Admissions by counsel, § 137.

Demurrer to evidence, § 138.

Payment into court, § 139.

#### § 134. Admissions in proceedings preliminary to trial.

Affidavits taken in proceedings preliminary to trial may be used in evidence in the trial as admissions of the party making them.<sup>1</sup> And the same is true of a party's deposition which, because of some irregularity in taking it, or because of the party's presence at the trial, is not admissible as a substitute for oral testimony.<sup>2</sup> So, an admission in a petition to remove a cause from a state to a federal court is conclusive on the petitioner in subsequent proceedings in the same cause in the federal court.<sup>3</sup>

<sup>1</sup> *Cameron v. Lightfoot*, 2 W. Bl. 1190; *Nat. S. S. Co. v. Tugman*, 143 U. S. 28; *Baker v. Hess*, 53 Ill. App. 473. The same is true of the affidavit of a third person, where it is used by the party in a preliminary proceeding. *Wabash & E. Canal v. Bledsoe*, 5 Ind. 133.

<sup>2</sup> *State v. Chatham Nat. Bank*, 80 Mo. 626; *Phenix M. L. Ins. Co. v. Clark*, 58 N. H. 164; *Carr v. Griffin*, 44 N. H. 510; *Parker v. Chancellor*, 78 Tex. 524; *Edwards v. Norton*, 55 Tex. 405.

**§ 135. Admissions in pleadings.**

A distinction is to be noted between admissions in pleadings considered as defining the issues to be tried, and, on the other hand, as evidence for the jury. In the first of these aspects, an admission in pleading of a material allegation is absolutely conclusive so long as it stands upon the record and is untraversed, but may be entirely got rid of by amendment. In the other aspect, considered as evidence, it is not generally conclusive, but cannot be got rid of by amendment.<sup>4</sup>

In the first of these aspects the question whether there is an admission and the question of its effect are always questions for the court; and it is error for the court to give the pleading to the jury to enable them to define the issue upon which they are to pass.<sup>5</sup> In the second aspect, when the pleading is offered as evidence, its effect as an admission is wholly a question for the jury, as would be the case with any other writing proved to have come from the same party and put in evidence as his admission; and after it has been read in evidence the court may, under the rules applicable to giving documents to the jury, let the jury take out the pleading, and give to the admission such weight and effect as they deem it entitled to.<sup>6</sup>

It follows from these distinctions that for the first-mentioned purpose of defining the issues the pleadings are before the court as part of its own record without offering them in evidence,<sup>7</sup> and that for the second purpose they are not before

<sup>3</sup> *Lumley v. Wabash R. Co.*, 71 Fed. 21. See *Nat. S. S. Co. v. Tugman*, 143 U. S. 28.

<sup>4</sup> Note, 23 *Abb. N. C. (N. Y.)* 394; *Barton v. Laws*, 4 *Colo. App.* 212. See, as to admission generally, 6 *Current Law*, 1063.

<sup>5</sup> *Porter v. Knight*, 63 *Iowa*, 365; *Browne v. Stecher L. Co.*, 24 *App. Div. (N. Y.)* 480.

<sup>6</sup> Note, 23 *Abb. N. C. (N. Y.)* 394.

<sup>7</sup> *Field v. Surpless*, 83 *App. Div. (N. Y.)* 268.

the jury nor proper to be considered by them unless formally offered in evidence like any other document and received as evidence by the court.<sup>8</sup>

Admissions in pleadings are of two kinds,—express and implied. The one occurs where an allegation in a pleading is in terms admitted to be true by an averment in a subsequent pleading; the other occurs where there is a failure to deny a material allegation in a preceding pleading.

(a) **Admissions as defining the issues.** An admission made in the course of pleading, whether expressly or by omitting to deny an allegation of the adversary, is taken as conclusive for all purposes of the case,<sup>9</sup> whether the facts relate to the

<sup>8</sup> Note, 23. Abb. N. C. (N. Y.) 394.

<sup>9</sup> *Bingham v. Stanley*, 2 Q. B. 117, 127; *Balloch v. Hooper*, 146 U. S. 363, 367; *Cent. R. Co. v. Stoermer*, 51 Fed. 518; *Hendy Mach. Works v. Pac. C. Const. Co.*, 99 Cal. 421; *Parker v. Lanier*, 82 Ga. 216; *Adams Exp. Co. v. Carnahan*, 29 Ind. App. 606, 94 A. S. R. 279, 281; *Hewitt v. Morgan*, 88 Iowa, 468; *Miller v. James*, 86 Iowa, 242; *Knoop v. Kelsey*, 102 Mo. 291, 22 A. S. R. 777; *Newell v. Meyendorff*, 9 Mont. 254, 18 A. S. R. 738, 742; *Foley v. Holtry*, 41 Neb. 563; *Dunham v. Cudlipp*, 94 N. Y. 129; *Miller v. Asheville*, 112 N. C. 759; *Walker v. Wooster's Adm'r*, 61 Vt. 403; *Nat. M. B. & L. Ass'n v. Ashworth*, 91 Va. 706; *Stearns v. Richmond*, 88 Va. 992, 29 A. S. R. 758; *Nugent v. Powell*, 4 Wyo. 173, 62 A. S. R. 17.

The same rule applies to bills in equity. *Jeffers v. Jeffers*, 139 Ill. 368.

A pleader is not thus concluded by an allegation of a false legal conclusion deduced from the facts alleged in the same pleading. *Salem v. Lane*, 189 Ill. 593, 82 A. S. R. 481. An admission in an answer as to the character of the instrument sued on, of which profert is made in the answer, is not conclusive as to the character of the instrument. *St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. R. Co.*, 135 Mo. 173, 33 L. R. A. 607.

An allegation in an answer is not conclusive as an admission except where it admits something alleged in the complaint. *Ferris v. Hard*, 135 N. Y. 354.

It has been held that an admission in pleading is not conclusive for all purposes of the cause, but only for all purposes regarding the

parties or to third persons,<sup>10</sup> provided that the allegation is material.<sup>11</sup> Consequently, a party making an admission in a pleading is precluded from offering evidence to contradict it;<sup>12</sup> and, in so far as the opposing party is concerned, the admission dispenses with the necessity of proving the fact admitted.<sup>13</sup>

— **Effect of failure to deny allegation.** A party admits the truth of all traversable allegations that he does not deny;<sup>14</sup> and, generally speaking, the denial must be specific. Where

issue arising from that particular pleading. *Robins v. Maidstone*, 4 Q. B. 811, 815.

It is only for the purposes of the trial that the allegations of a pleading are conclusive. Consequently, a party who denies title in himself is not thereby estopped, after a verdict negating that denial, from claiming an exemption in the property as owner. *Etheridge v. Davis*, 111 N. C. 293.

Though pleadings are not authorized in justice court, yet a pleading filed there may be taken on appeal as a formal admission of the party filing it. *Warder v. Willyard*, 46 Minn. 531, 24 A. S. R. 250.

<sup>10</sup> *Bingham v. Stanley*, 2 Q. B. 117, 127.

<sup>11</sup> *Bingham v. Stanley*, 2 Q. B. 117, 127.

<sup>12</sup> *Wilcoxson v. Burton*, 27 Cal. 228, 87 A. D. 66; *Fleischmann v. Stern*, 90 N. Y. 110; *Van Dyke v. Maguire*, 57 N. Y. 429.

This rule is not waived by the adversary's introducing evidence in support of the allegation admitted. *Paige v. Willet*, 38 N. Y. 28; *Potter v. Smith*, 70 N. Y. 299. The rule of the text prevails in equity also. *Fletcher*, Eq. Plead. & Pr. § 640.

<sup>13</sup> *First Nat. Bank v. Ragsdale*, 158 Mo. 668, 81 A. S. R. 332; *Robertson v. Sayre*, 134 N. Y. 97, 30 A. S. R. 627, 628; *Aultman & T. Co. v. Gunderson*, 6 S. D. 226, 55 A. S. R. 837; *Sheehy v. Blake*, 77 Wis. 394, 9 L. R. A. 564. The rule is the same in equity. *Fletcher*, Eq. Plead. & Pr. § 640.

<sup>14</sup> *Hudson v. Jones*, 1 Salk. 90; *Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 531, 60 A. S. R. 178; *Lorscher v. Supreme Lodge*, 72 Mich. 316, 2 L. R. A. 206; *Gunn's Adm'r v. Todd*, 21 Mo. 303, 64 A. D. 231. This is true in equity, also. If the defendant fails to answer the bill, the complainant may obtain a decree pro confesso. If the complainant fails to file a replication to the answer, its allegations are taken as true. *Fletcher*, Eq. Plead. & Pr. §§ 140, 636.

material allegations in a complaint are not directly denied, a statement in the answer of other facts inconsistent with them will not be construed as a denial, and so prevent them from being taken as true.<sup>15</sup>

The modern codes of procedure have introduced some qualifications of this rule. If an answer contains new matter not pleaded by way of counterclaim, or if a reply contains new matter, this is taken on the trial as controverted without a formal denial.<sup>16</sup> And in some states the rule in equity is that a material allegation of a bill which is neither admitted nor denied by the answer is to be taken as controverted, though the authorities are not in accord as to this.<sup>17</sup>

An allegation will not be taken as true from the failure to controvert it unless it is material and essential to the case of the party who makes it.<sup>18</sup>

— **Several answers.** Denials in one answer are not affected by other answers containing admissions. An admission in one of several answers will not conclude the defendant from disproving the fact in question if it is denied in one of the other answers.<sup>19</sup>

— **Effect of amendment.** The effect of an express or im-

<sup>15</sup> *Fleischmann v. Stern*, 90 N. Y. 110.

<sup>16</sup> *Higley v. Burlington, C. R. & N. R. Co.*, 99 Iowa, 503, 61 A. S. R. 250; *Mills County Nat. Bank v. Perry*, 72 Iowa, 15, 2 A. S. R. 228; *Powers v. Kueckhoff*, 41 Mo. 425, 97 A. D. 281.

<sup>17</sup> *Fletcher*, Eq. Plead. & Pr. § 655.

<sup>18</sup> *Sands v. St. John*, 36 Barb. (N. Y.) 628, 23 How. Pr. 140; *Oechs v. Cook*, 10 N. Y. Super. Ct. (3 Duer) 161. Unnecessary allegations in a complaint are admitted, however, where they are made material by new matter in an answer which does not controvert them. *Hopkins v. Ward*, 67 Barb. (N. Y.) 452.

<sup>19</sup> *Miles v. Woodward*, 115 Cal. 308; *Palmer v. Poor*, 121 Ind. 135, 6 L. R. A. 469; *Treadway v. S. C. & St. P. R. Co.*, 40 Iowa, 526; *Lyons v. Ward*, 124 Mass. 364; *Swift v. Kingsley*, 24 Barb. (N. Y.) 541.

This is so by statute in Massachusetts. *Baldwin v. Gregg*, 13 Metc. (Mass.) 253.

plied admission may, for the first-mentioned purpose of defining the issues, be entirely overcome by amendment of the pleading containing it,<sup>20</sup> or by the abandonment of the pleading before trial without objection from the adverse party.<sup>21</sup>

— **Pleas in abatement.** An admission in a plea in abatement is not binding after the plea has been overruled and an answer to the merits has been interposed.<sup>22</sup>

— **Demurrers.** A demurrer admits the facts alleged in the pleading demurred to,<sup>23</sup> if well pleaded,<sup>24</sup> for the purpose of having the court pass on their legal sufficiency,<sup>25</sup> and for that purpose only.<sup>26</sup> Consequently, if it is overruled, and the

<sup>20</sup> *Lincoln Nat. Bank v. Butler*, 14 Misc. (N. Y.) 464, 72 N. Y. St. Rep. 261; *Houghtaling v. Lloyd*, 39 N. Y. St. Rep. 580, 21 Civ. Proc. R. (Browne) 56.

<sup>21</sup> *Mahoney v. Butte Hardware Co.*, 19 Mont. 377.

<sup>22</sup> *Watters v. Parker* (Tex.) 19 S. W. 1022.

<sup>23</sup> *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 A. S. R. 586; *Munger v. Baldrige*, 41 Kan. 236, 13 A. S. R. 273; *Belknap v. Ball*, 83 Mich. 583, 21 A. S. R. 622; *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 89 A. S. R. 828; *Douglas v. Coonley*, 156 N. Y. 521, 66 A. S. R. 580; *Tarver v. Garlington*, 27 S. C. 107, 13 A. S. R. 628.

<sup>24</sup> *Manning v. Pippen*, 86 Ala. 357, 11 A. S. R. 46; *Coxe v. Gulick*, 10 N. J. Law, 328.

Statements of conclusions, either of fact or of law, are not admitted by a demurrer. *McCreery v. Berney Nat. Bank*, 116 Ala. 224, 67 A. S. R. 105; *Branham v. San Jose*, 24 Cal. 585; *Clark v. Mut. R. F. L. Ass'n*, 14 App. D. C. 154, 43 L. R. A. 390; *McPhail v. People*, 160 Ill. 77, 52 A. S. R. 306; *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa, 312, 31 A. S. R. 477; *People's M. Assur. Fund v. Boesse*, 92 Ky. 290; *American Waterworks Co. v. State*, 46 Neb. 194, 50 A. S. R. 610; *Greeff v. Equitable L. Assur. Soc.*, 160 N. Y. 19, 73 A. S. R. 659; *Longshore Print. Co. v. Howell*, 26 Or. 527, 46 A. S. R. 640; *State v. Edgerton Dist. Board*, 76 Wis. 177, 20 A. S. R. 41. The same is true in equity. *Ryan v. McLane*, 91 Md. 175, 50 L. R. A. 501.

Facts against common knowledge are not admitted by a demurrer. *Southern R. Co. v. Covenia*, 100 Ga. 46, 62 A. S. R. 312; *State v. Edgerton Dist. Board*, 76 Wis. 177, 20 A. S. R. 41.

<sup>25</sup> *Bomar v. Means*, 37 S. C. 520, 34 A. S. R. 772.

<sup>26</sup> *Pease v. Phelps*, 10 Conn. 62.

demurrant interposes a pleading to the merits, the demurrer has no effect against him in the trial as an admission.<sup>27</sup>

(b) **Admissions as evidence.** A pleading is admissible in the same action against the pleader as an admission of the facts alleged in it.<sup>28</sup> However, admissions in a declaration may be used by the defendant as evidence without offering the declaration itself in evidence or otherwise proving the admissions.<sup>29</sup>

— **Several answers.** A plea containing an admission is admissible against the pleader in the trial of another plea in the same case.<sup>30</sup>

— **Pleadings of coparty.** A pleading interposed by one party only is not admissible in evidence as an admission of a coparty,<sup>31</sup> unless there is privity between the two.<sup>32</sup>

— **Comment on pleadings by counsel in argument.** In the absence of statute to the contrary, counsel may in their argument to the jury comment on the pleadings, even though they have not been introduced in evidence.<sup>33</sup>

<sup>27</sup> *McKinzie v. Mathews*, 59 Mo. 99. See, however, *Sprague v. N. Y. & N. E. R. Co.*, 68 Conn. 345, 37 L. R. A. 638.

<sup>28</sup> *Fite v. Black*, 92 Ga. 363; *Ferris v. Hard*, 135 N. Y. 354, 361 (semble).

The rule applies to admissions in an unsworn answer in equity. *Craft v. Schlag*, 61 N. J. Eq. 567. It applies, also, to bills of particulars. *Lee v. Heath*, 61 N. J. Law, 250. And also to affidavits of defense. *Bowen v. De Lattre*, 6 Whart. (Pa.) 430.

The rule stated in the text has been abrogated by statute in Massachusetts. *Phillips v. Smith*, 110 Mass. 61.

<sup>29</sup> *East Tenn., V. & G. R. Co. v. Kane*, 92 Ga. 187, 22 L. R. A. 315.

<sup>30</sup> *Howard v. Glenn*, 85 Ga. 238, 21 A. S. R. 156.

<sup>31</sup> *Clark's Ex'rs v. Van Riemsdyk*, 9 Cranch (U. S.) 153; *Blakeney v. Ferguson*, 14 Ark. 640; *Reese v. Reese*, 41 Md. 554.

<sup>32</sup> *Field v. Holland*, 6 Cranch (U. S.) 8.

<sup>33</sup> *Field v. Surpless*, 83 App. Div. (N. Y.) 268; *Holmes v. Jones*, 121 N. Y. 461; *Tisdale v. Delaware & H. Canal Co.*, 116 N. Y. 416.

It has been held, however, that where an instruction given for the jury's guidance makes no reference to the pleadings, so that the jury are not required to examine them, counsel for plaintiff will not be

— **Effect of striking out, withdrawal, or amendment of pleading.** An admission in a pleading is admissible in evidence against the party even after the pleading has been stricken out<sup>34</sup> or withdrawn,<sup>35</sup> and even after the pleading has been amended in that respect,<sup>36</sup> subject, however, to the right of the pleader to show that the admission was placed in the original pleading through inadvertence or mistake.<sup>37</sup>

permitted to read the declaration to the jury and argue that its allegations are sustained by the evidence. *Hitchins v. Frostburg*, 68 Md. 100, 6 A. S. R. 422.

In Massachusetts no pleading can be used or commented on as evidence in the trial of the case in which it is filed. *Phillips v. Smith*, 110 Mass. 61. Thus, the plaintiff's counsel may not comment on the discrepancy between the original and amended answers, and argue from it that the defense is fictitious. *Taft v. Fiske*, 140 Mass. 250, 54 A. R. 459. And see *Woodworth v. Thompson*, 44 Neb. 311.

<sup>34</sup> Admissions in an answer which has been stricken by order of court are admissible against the pleader where the order to strike was irregular. *Fite v. Black*, 92 Ga. 363.

An admission which has been stricken from a pleading, subject to exception, is admissible against the party making it. *Peckham Iron Co. v. Harper*, 41 Ohio St. 100.

Statements in a special plea that has been held bad on demurrer are not evidence for the plaintiff, however, in a trial on the general issue. *Montgomery v. Richardson*, 5 Car. & P. 247.

<sup>35</sup> *Barton v. Laws*, 4 Colo. App. 212; *Daub v. Englebach*, 109 Ill. 267; *Baltimore & O. & C. R. Co. v. Evarts*, 112 Ind. 533; *Boots v. Canine*, 94 Ind. 408; *Lindner v. St. Paul F. & M. Ins. Co.*, 93 Wis. 526. *Contra*, *Wheeler v. West*, 71 Cal. 126; *Johnson v. Powers*, 65 Cal. 179; *Baldwin v. Gregg*, 13 Metc. (Mass.) 253 (statute).

A withdrawn pleading is not conclusive on the pleader, however. It is merely evidence. *Barton v. Laws*, 4 Colo. App. 212.

<sup>36</sup> *Soaps v. Eichberg*, 42 Ill. App. 375; *Ludwig v. Blackshere*, 102 Iowa, 366; *Juneau v. Stunkle*, 40 Kan. 756; *Walser v. Wear*, 141 Mo. 443; *Adams v. Utley*, 87 N. C. 356; *Hall v. Woodward*, 30 S. C. 564; *Kilpatrick-Koch D. G. Co. v. Box*, 13 Utah, 494. See *McDonald v. Humphries*, 56 Ark. 63. *Contra*, *Miles v. Woodward*, 115 Cal. 308.

The original pleading is not conclusive after amendment. It is only evidence. *Hall v. Woodward*, 30 S. C. 564.

<sup>37</sup> *Ludwig v. Blackshere*, 102 Iowa, 366.



After a pleading has been amended, however, the original pleading has no effect as an admission unless offered in evidence.<sup>38</sup>

**§ 136. Admissions in agreed facts and in open court.**

An agreed statement of facts is conclusive in the same action for all the purposes of the case;<sup>39</sup> and the same is true of an admission made in open court.<sup>40</sup>

If a fact has been admitted, it rests in the discretion of the trial court whether the opposite party shall nevertheless be allowed to prove the fact by evidence.<sup>41</sup>

Where a pleading is not sworn to by a party, and is prepared by his attorney under a misapprehension of the facts, it is not, after an amended pleading has been filed to correct the mistake, admissible in evidence against the pleader as an admission of the facts mistakenly alleged in it. *Fletcher, Eq. Plead. & Pr. § 640; Wenegar v. Boltendach*, 180 Ill. 222.

<sup>38</sup> *Leach v. Hill*, 97 Iowa, 81; *Woodworth v. Thompson*, 44 Neb. 311; *Folger v. Boyinton*, 67 Wis. 447. *Contra*, *Smith v. Pelott*, 63 Hun (N. Y.) 632.

<sup>39</sup> *Harvey v. Thorpe*, 28 Ala. 250, 65 A. D. 344; *Reich v. Cochran*, 151 N. Y. 122, 56 A. S. R. 607, 611; *National Mut. Bldg. & L. Ass'n v. Ashworth*, 91 Va. 706.

An agreed statement of facts admitted by the parties to be true in open court is binding, though not signed. *Prestwood v. Watson*, 111 Ala. 604.

However, the parties cannot, by affirmation and admission, raise a speculative question for decision. *Union Coal Co. v. La Salle*, 136 Ill. 119, 12 L. R. A. 326. Nor can a judgment that a statute is invalid be based on an admission. *State v. Aloe*, 152 Mo. 466, 47 L. R. A. 393.

<sup>40</sup> *Kansas & A. V. R. Co. v. Fitzhugh*, 61 Ark. 341, 54 A. S. R. 211; *Thompson v. Thompson*, 9 Ind. 323, 68 A. D. 638, 647 (semble); *Fahey v. State*, 27 Tex. App. 146, 11 A. S. R. 182.

The same is true of a disclaimer. *Hansell v. Hansell*, 44 La. Ann. 548.

In an admiralty case, the court regarded as an admission in the cause a communication formally made to the court by counsel for a party after the trial had closed. *The Harry*, 9 Ben. 524, Fed. Cas. No. 6,147.

**§ 137. Admissions by counsel.**

An admission by an attorney, if distinctly and formally made with reference to a matter relating to the cause of action for the purpose of alleviating the stringency of some rule of practice or of dispensing with formal proof of some fact at the trial, is binding and conclusive on the client.<sup>42</sup> To bind the client the admissions must be distinct and formal, and made for the express purpose of dispensing with formal proof of a fact at the trial. Admissions made by an attorney in the course of a mere informal conversation or discussion, though they relate to the facts in controversy, are not binding on the client.<sup>43</sup> As to whether or not an admission made by counsel in his opening statement of the case is binding on the client, there seems to be some conflict of authority.<sup>44</sup>

<sup>41</sup> *Dunning v. Maine Cent. R. Co.*, 91 Me. 87, 64 A. S. R. 208; *Whiteside v. Lowney*, 171 Mass. 431; *Hobart v. Cook*, 167 Mass. 55.

<sup>42</sup> *Rosenbaum v. State*, 33 Ala. 354; *Wilson v. Spring*, 64 Ill. 14; *Talbot v. McGee*, 4 T. B. Mon. (Ky.) 375, 377; *Marsh v. Mitchell*, 26 N. J. Eq. 497; *Garrett v. Hanshue*, 53 Ohio St. 482, 35 L. R. A. 321. See, generally, 6 Current Law, 1555.

The client may be bound by admissions of the attorney in a letter to a third person. *Holderness v. Baker*, 44 N. H. 414.

As a rule, verbal admissions of counsel bind the client. *Prestwood v. Watson*, 111 Ala. 604. It is provided otherwise by statute in California. *Merritt v. Wilcox*, 52 Cal. 238.

Admissions of material facts cannot be made by counsel for the accused in criminal cases. *Clayton v. State*, 4 Tex. App. 515. *Contra*, *Com. v. McMurray*, 198 Pa. 51, 82 A. S. R. 787. They may be read in evidence against him if made with his consent, however. *People v. Garcia*, 25 Cal. 531.

<sup>43</sup> *Young v. Wright*, 1 Camp. 139, 140; *Watson v. King*, 3 C. B. 608; *Petch v. Lyon*, 9 Q. B. 147; *Rockwell v. Tayler*, 41 Conn. 55; *Treadway v. S. C. & St. P. R. Co.*, 40 Iowa, 526; *McKeen v. Gammon*, 33 Me. 187; *Saunders v. McCarthy*, 8 Allen (Mass.) 42; *Angle v. Bilby*, 25 Neb. 595; *Underwood v. Hart*, 23 Vt. 120. See, however, *Holt v. Squire*, *Ryan & M.* 282; *Marshall v. Cliff*, 4 Camp. 133.

<sup>44</sup> In the following cases the admission was binding: *Oscanyon v. Arms Co.*, 103 U. S. 261; *Pratt v. Conway*, 148 Mo. 291, 71 A. S. R. 602.

To bind the client the admissions must, of course, have been made within the scope of the attorney's authority,<sup>45</sup> and during the continuance of the agency;<sup>46</sup> but it is not necessary that suit shall have been brought. An admission made by an attorney who has been retained with reference to a certain matter is binding on the client in that respect, even though no action is pending at the time it is made.<sup>47</sup>

### § 138. Demurrer to evidence.

For the purpose of determining the legal sufficiency of the facts to justify a recovery, a demurrer to evidence admits all the facts which the evidence adduced by the demurrant's adversary tends to prove.<sup>48</sup>

A contrary view was taken in the following cases: *Jessup's Estate*, 81 Cal. 408, 6 L. R. A. 594; *Lake Erie & W. R. Co. v. Rooker*, 13 Ind. App. 600; *Ferson v. Wilcox*, 19 Minn. 449 (semble).

<sup>45</sup> *Wenans v. Lindsey*, 1 How. (Miss.) 577.

An attorney cannot surrender a substantial right of the client without his consent. *Dickerson v. Hodges*, 43 N. J. Eq. 45, 47.

Admissions by a managing clerk or by an agent of the attorney, see *Taylor v. Willans*, 2 Barn. & Adol. 845; *Truslove v. Burton*, 9 Moore, 64; *Standage v. Creighton*, 5 Car. & P. 406; *Power v. Kent*, 1 Cow. (N. Y.) 211.

<sup>46</sup> *Walden v. Bolton*, 55 Mo. 405; *Janeway v. Skerritt*, 30 N. J. Law, 97.

The agency cannot be established by admissions of the attorney. *Worley v. Hineman*, 6 Ind. App. 240, 257 (semble). See, also, *Wagstaff v. Wilson*, 4 Barn. & Adol. 339.

<sup>47</sup> *Marshall v. Cliff*, 4 Camp. 133. And see *Hefferman v. Burt*, 7 Iowa, 320, 71 A. D. 445.

<sup>48</sup> *Fowle v. Alexandria*, 11 Wheat. (U. S.) 320; *Pennsylvania Co. v. Stegemeler*, 118 Ind. 305, 10 A. S. R. 136; *Golden v. Knowles*, 120 Mass. 336; *Nat. Bank of Com. v. American Exch. Bank*, 151 Mo. 320, 74 A. S. R. 527; *Patton v. Bragg*, 113 Mo. 595, 35 A. S. R. 730; *Hopkins v. Nashville, C. & St. L. R. Co.*, 96 Tenn. 409, 32 L. R. A. 354; *Richmond Ry. & El. Co. v. Garthright*, 92 Va. 627, 53 A. S. R. 839; *Jones v. Old Dominion Cotton Mills*, 82 Va. 140, 3 A. S. R. 92; *Williamson v. Newport News & M. V. Co.*, 34 W. Va. 657, 26 A. S. R. 927; 7 Current Law, 1155.

§ 139. **Payment into court.**

If money is paid into court upon a declaration containing but one cause of action, which is specially set forth, whether in contract or in tort, it operates as a conclusive admission of every fact necessary for the plaintiff to prove in order to maintain his action, leaving open only the question whether he is entitled to recover a greater sum than that paid in.<sup>49</sup>

The payment, whether the action sounds in contract or in tort, admits nothing more than would entitle the plaintiff to recover the amount so paid.<sup>50</sup> Furthermore, if the contract declared on is invalid, payment into court gives it no validity.<sup>51</sup>

A plea of payment into court interposed to one or more indebtedness counts admits only that the plaintiff has a cause of action, to the amount of the sum paid in, on one or more of the contracts declared on.<sup>52</sup> If there are several counts in the

<sup>49</sup> *Dyer v. Ashton*, 1 Barn. & C. 3; *Archer v. English*, 9 Dowl. 21, 2 Scott N. R. 156, 1 Man. & G. 873; *Cox v. Brain*, 3 Taunt. 95; *Lipscombe v. Holmes*, 2 Camp. 441; *Gutteridge v. Smith*, 2 H. Bl. 374; *Israel v. Benjamin*, 3 Camp. 40; *Middleton v. Brewer*, Peake Add. Cas. 15; *Randall v. Lynch*, 2 Camp. 352, 357; *Leggett v. Cooper*, 2 Stark. 103; *Bacon v. Charlton*, 7 Cush. (Mass.) 581.

A bill of particulars, filed after a declaration in general assumpsit, is not equivalent to a declaration in special assumpsit, within the meaning of this rule. *Blackburn v. Scholes*, 2 Camp. 341.

By taking out a summons to be permitted to pay a certain sum in discharge of the claim, the defendant admits that so much is due from him. *Williamson v. Henley*, 6 Bing. 299. By paying money into court the defendant admits jurisdiction of his person. *Miller v. Williams*, 5 Esp. 19, 21. See, generally, 6 Current Law, 994.

<sup>50</sup> *Rigge v. Burbidge*, 15 Mees. & W. 598; *Rucker v. Palsgrave*, 1 Camp. 557, 1 Taunt. 419; *Hitchcock v. Tyson*, 2 Esp. 481, note; *Seaton v. Benedict*, 5 Bing. 28; *Schreger v. Carden*, 16 Jur. 568; *Story v. Finno*, 6 Exch. 123.

<sup>51</sup> *Ribbans v. Crickett*, 1 Bos. & P. 264.

<sup>52</sup> *Stapleton v. Nowell*, 6 Mees. & W. 9; *Archer v. English*, 9 Dowl. 21, 2 Scott, N. R. 156, 1 Man. & G. 873; *Kingham v. Robins*, 5 Mees. & W. 94. See, however, *Bennett v. Francis*, 2 Bos. & P. 550; *Huntington*

declaration, and the defendant does not specify on which the payment is to be applied, the payment is an admission only that the defendant owes the plaintiff the amount so tendered on some one or more of the several counts. It does not admit an indebtedness on any particular count, nor a liability on all.<sup>53</sup> If there are two inconsistent counts, on the latter of which money is paid into court, which the plaintiff accepts, the defendant is not entitled to show this to the jury in order to negative any allegation in the first count.<sup>54</sup>

### ART. III. EFFECT IN SECOND TRIAL.

§ 140. A judicial admission may be conclusive in a second trial of the issue.<sup>55</sup> Thus, an admission of counsel binds the client in a subsequent trial if it appears to have been intended to be general, and not limited in purpose to the trial in which it is made.<sup>56</sup> An admission made for the purpose of one trial only does not thus bind the party in a second trial, however.<sup>57</sup>

*v. American Bank*, 6 Pick. (Mass.) 340; *Jones v. Hoar*, 5 Pick. (Mass.) 285.

<sup>53</sup> *Hubbard v. Knous*, 7 Cush. (Mass.) 556.

<sup>54</sup> *Gould v. Oliver*, 2 Man. & G. 208.

<sup>55</sup> *Langley v. Oxford*, 1 Mees. & W. 508; *Woodcock v. Calais*, 68 Me. 244.

An affidavit for certiorari, though not binding on the affiant in a second trial, is admissible in evidence against him. *Mushat v. Moore*, 20 N. C. (4 Dev. & B.) 257.

<sup>56</sup> *Doe d. Wetherell v. Bird*, 7 Car. & P. 6; *Elton v. Larkins*, 1 Moore & R. 196; *Cent. Branch N. P. R. Co. v. Shoup*, 28 Kan. 394, 42 A. R. 163. And see *Central Bridge Corp. v. Lowell*, 15 Gray (Mass.) 106, 128.

This is certainly true where the admission was reduced to writing and embodied in the record of the case on the first trial. *Holley v. Young*, 68 Me. 215, 28 A. R. 40.

<sup>57</sup> An admission, made to prevent a continuance, that an absent witness, if present, would testify to a certain state of facts, is not admissible at a subsequent trial when the witness is present in court. *Cutler v. Cutler*, 130 N. C. 1, 89 A. S. R. 854.

An agreed statement of facts or an agreed case is admissible in evidence in a second trial of the action as an admission of either party to it;<sup>58</sup> and this is true, even though it was made for the purpose of the first trial only, and was afterwards withdrawn.<sup>59</sup> It is not, however, conclusive of the facts which it recites. Consequently, either party may explain or disprove any statement contained in it.<sup>60</sup>

**ART. IV. CONSTRUCTION OF ADMISSION—INTRODUCTION OF ENTIRE WRITING.**

§ 141. Where a judicial admission is offered in evidence, the entire writing must be looked to in order to determine the nature and extent of the admission;<sup>61</sup> and it has been held that the party desiring to use the admission must ordinarily introduce the entire writing in which it occurs.<sup>62</sup> However, a party who gives in evidence an admission in the pleading of his adversary is not estopped to question a part of it which is against him. He may use the admission so far as it makes in his favor, and disprove the rest.<sup>63</sup>

If only a part of the writing containing a judicial admission

The concession of a party on a former trial, when not attached to the record, binds him in that trial only. *Pearl v. Allen*, 1 Tyler (Vt.) 4.

A demurrer to evidence is not binding as an admission in a subsequent trial of the case. *Mitchell v. Bannon*, 10 Ill. App. 340.

<sup>58</sup> *Prestwood v. Watson*, 111 Ala. 604; *Merchants' Bank v. Marine Bank*, 3 Gill (Md.) 96, 43 A. D. 300. And see *Perry v. Simpson W. Mfg. Co.*, 40 Conn. 313.

<sup>59</sup> *King v. Shepard*, 105 Ga. 473.

<sup>60</sup> *King v. Shepard*, 105 Ga. 473. And see *Perry v. Simpson W. Mfg. Co.*, 40 Conn. 313.

<sup>61</sup> *Gildersleeve v. Landon*, 73 N. Y. 609.

Plea of set-off and copy of account held inadmissible without the introduction of the declaration also. *Gardner v. Meeker*, 169 Ill. 40.

<sup>62</sup> *Southern R. Co. v. Hubbard*, 116 Ala. 387. And see *People v. Hayes*, 140 N. Y. 484, 37 A. S. R. 572, 579.

<sup>63</sup> *Mott v. Consumers' Ice Co.*, 73 N. Y. 543.

is introduced against the party who made it, he in turn may put in so much of the rest of the writing as is necessary to illustrate, qualify, or explain the admission.<sup>64</sup> In some cases it has been held that he may put in only so much of it.<sup>65</sup> In other cases he has been allowed to put in the entire writing.<sup>66</sup>

#### ART. V. WITHDRAWAL OF ADMISSION.

§ 142. If a judicial admission has been made improvidently, inadvertently, or by mistake, the court may in its discretion relieve the party from the consequences of his error<sup>67</sup> by ordering a repleader, or by discharging the case stated or the agreement if made in court, or by allowing the admission to be withdrawn.<sup>68</sup> However, a party will not be allowed to withdraw

<sup>64</sup> *Davies v. Flewellen*, 29 Ga. 49; *Moore v. Wright*, 90 Ill. 470; *Gunn's Adm'r v. Todd*, 21 Mo. 303, 64 A. D. 231 (semble); *Gildersleeve v. Mahony*, 5 Duer (N. Y.) 383.

<sup>65</sup> *Siberry v. State* (Ind.) 39 N. E. 936; *Gunn's Adm'r v. Todd*, 21 Mo. 303, 64 A. D. 231; *In re Chamberlain*, 140 N. Y. 390, 37 A. S. R. 568, 569.

<sup>66</sup> *Bath v. Bathersea*, 5 Mod. 9; *Callan v. McDaniel*, 72 Ala. 96; *Roberts v. Tennell*, 3 T. B. Mon. (Ky.) 247, 249 (semble).

<sup>67</sup> *Jannette v. Great Western R. Co.*, 4 U. C. C. P. 488; *Harvey v. Thorpe*, 28 Ala. 250, 65 A. D. 344; *Wallace v. Matthews*, 39 Ga. 617, 99 A. D. 473; *Holley v. Young*, 68 Me. 215, 28 A. R. 40; *Smith v. Fowler*, 12 Lea (Tenn.) 163.

An admission from which the adversary may gain a legal right may not be withdrawn without his consent. It is otherwise where the admission confers no right. *Kohn v. Marsh*, 3 Rob. (La.) 48.

<sup>68</sup> 1 Greenl. Ev. § 206.

If an admission is made in a pleading through mistake, the party pleading should ask leave to amend. It is not sufficient merely to introduce evidence of the mistake in the trial. If he does no more than this, he remains bound by the admission. *Foley v. Holtry*, 41 Neb. 563, 565.

In England it was held in 1832 that if a party wishes to withdraw a written admission of fact made for the purpose of the trial he should take out a summons before a judge to obtain permission so to do. *Elton v. Larkins*, 5 Car. & P. 385.

an admission if the situation has so changed, as by the death of a witness, that his adversary will be prejudiced by the withdrawal;<sup>69</sup> nor will a withdrawal be permitted unless sufficient time remains for the adverse party to prepare his case for trial on the points to which the admission relates. A withdrawal in the course of the trial will not ordinarily be allowed.<sup>70</sup>

While an admission made in court may be retracted at a subsequent trial, yet the fact that it was once made is still competent evidence against the party who made it.<sup>71</sup>

<sup>69</sup> *Wilson v. Louisiana Bank*, 55 Ga. 98; *Wallace v. Matthews*, 39 Ga. 617, 99 A. D. 473.

<sup>70</sup> *Wallace v. Matthews*, 39 Ga. 617, 99 A. D. 473; *Hargroves v. Redd*, 43 Ga. 142.

An admission may be withdrawn only on ample notice to the adverse party. *Hargroves v. Redd*, 43 Ga. 142, 150.

<sup>71</sup> *Perry v. Simpson W. Mfg. Co.*, 40 Conn. 313.



## **CHAPTER IV.**

### **ESTOPPEL.**

**ART. I. GENERAL CONSIDERATIONS.**

**ART. II. ESTOPPEL BY RECORD.**

**ART. III. ESTOPPEL BY DEED.**

**ART. IV. ESTOPPEL BY CONTRACT.**

**ART. V. ESTOPPEL BY MISREPRESENTATION.**

#### **ART. I. GENERAL CONSIDERATIONS.**

§ 143. There are four kinds of estoppel, viz.: (1) Estoppel by record, of which the important illustration is the estoppel created by a judgment; (2) estoppel by deed, meaning by the latter term a sealed instrument of any sort; (3) estoppel by contract, simple or otherwise, which in part is closely related to estoppel by deed, and in part rests perhaps on the broader principle of which that form of estoppel is but an application; and (4) estoppel by misrepresentation, either express or implied from conduct. Estoppel by contract and estoppel by misrepresentation are known as estoppel in pais,—the former, in one respect, with questionable propriety. Estoppel by misrepresentation is known also as equitable estoppel.

The law of estoppel is not a part of the law of evidence, in the proper sense of the latter term. In a certain aspect, however, certain rules of estoppel are closely associated with the law of evidence in that they bear upon the right or the necessity of adducing evidence concerning the subject-matter of the estoppel. This relation between these two disparate branches of the law is the more readily accepted because of the fact that the question of estoppel is oftentimes (in certain classes of cases, always) presented on an offer of evidence and objection thereto.

## ART. II. ESTOPPEL BY RECORD.

## A. General Considerations, § 144.

## B. Estoppel by Judgment.

## General considerations, § 145.

- (a) Record of judgment as evidence and effect of judgment as estoppel.
- (b) Judgment as bar to action or defense and judgment as proof of matter determined.
- (c) Relation of estoppel by judgment to law of evidence.

## Requisites of judgment, § 146.

- (a) Character of court.
- (b) Validity of judgment.
- (c) Finality of judgment.

## Persons estopped and entitled to urge estoppel, § 147.

- (a) General rule.
- (b) Real and nominal parties.
- (c) Corporate parties.
- (d) Coparties.
- (e) Additional parties.
- (f) Severance of parties.
- (g) Parties in different capacities.
- (h) Evidence of identity.
- (i) Privies.

## Questions concluded, § 148.

- (a) General rule.
- (b) Identity of cause of action.
- (c) Identity of matter in dispute.
- (d) Incidental and collateral matters.
- (e) Necessity of actual determination.
- (f) Evidence of identity.
- (g) Burden of proof.
- (h) Province of court and of jury.

## A. GENERAL CONSIDERATIONS.

§ 144. The earliest form of estoppel is that arising from a record.<sup>1</sup> The record here referred to may be either a legislative roll or the judgment roll of a court.<sup>2</sup> A two-fold estop-

<sup>1</sup> Bigelow, Estop. (5th Ed.) 4.

<sup>2</sup> Bigelow, Estop. (5th Ed.) 35; 11 Am. & Eng. Enc. Law (2d Ed.) 389, 391; Taylor v. Beckham, 108 Ky. 278, 94 A. S. R. 357.

The state may be estopped by an act of its legislature. *Enfield v. Permit*, 5 N. H. 280, 20 A. D. 580. But the legislature cannot, by the

pel arises from a judicial record; first, from the record considered as a memorial or entry of the judgment, and, second, from the record considered as a judgment. "In the case first mentioned, the record has conclusive effect upon all the world. It imports absolute verity, not only against the parties to it and those in privity with them, but against strangers also; no one may produce evidence to impeach it."<sup>3</sup> The estoppel arising from the record considered as a judgment, on the other hand, binds only the parties to the proceeding and those in privity with them.<sup>4</sup> It is with a certain phase of this latter form of estoppel by judicial record that the present article is concerned.

#### B. ESTOPPEL BY JUDGMENT.

##### § 145. General considerations.

(a) **Record of judgment as evidence and effect of judgment as estoppel.** It should be noticed in the present connection that, when it is desired to take advantage of a prior adjudication, two questions are presented: First, how may the judgment be proved? and, second, when proved, what effect does the judgment have? The first is a preliminary question which concerns the law of evidence, in the strict sense of the term. It relates, however, to means of proof, and does not therefore

terms of an act, conclude the state from inquiring judicially into the validity and constitutionality of the act. *State v. Graham*, 23 La. Ann. 402.

<sup>3</sup> Bigelow, *Estop.* (5th Ed.) 8, 35; Black, *Judgm.* §§ 604, 605; *Simmons v. Shelton*, 112 Ala. 284, 57 A. S. R. 39; *Pico v. Webster*, 14 Cal. 202, 73 A. D. 647; *Ambler v. Whipple*, 139 Ill. 311, 32 A. S. R. 202; *Westfield G. & M. Co. v. Noblesville & E. G. R. Co.*, 13 Ind. App. 481, 55 A. S. R. 244; *Littleton v. Richardson*, 34 N. H. 179, 66 A. D. 759; *Terry v. Munger*, 121 N. Y. 161, 18 A. S. R. 803; *Stephens v. Fox*, 83 N. Y. 313; *Faulcon v. Johnston*, 102 N. C. 264, 11 A. S. R. 737; *Stephens v. Jack*, 3 Yerg. (Tenn.) 403, 24 A. D. 583 (semble); *Spaulding v. Chamberlin*, 12 Vt. 538, 36 A. D. 358; *First Nat. Bank v. Huntington D. Co.*, 41 W. Va. 530, 56 A. S. R. 878; *Bolln v. Metcalf*, 6 Wyo. 1, 71 A. S. R. 898. And see 7 *Current Law*, 1489.

<sup>4</sup> Section 147, *infra*.

fall within the scope of the present volume, whose subject is those rules which concern the question of the right or the necessity of adducing evidence. The second question, on the other hand, presents a question of estoppel which, as will shortly be seen, touches the right or the necessity of adducing evidence as to the matter previously determined,—the right of the party against whom the judgment is offered to adduce evidence in denial of the facts adjudicated; the necessity resting on his adversary of adducing evidence in proof of those facts. And it is to be observed that, as has just been intimated, before this second question—this question of estoppel by former adjudication—can arise, it is necessary for the party relying on the judgment to bring it before the court, either by pleading or by evidence or by both, as rules of law and practice may prescribe. Unless the former adjudication is admitted, either in pleading or in the trial, it must be proved by competent evidence. It is accordingly assumed in the following discussion that the judgment of which advantage is sought to be taken as an estoppel has been either admitted or proved, so that the only question concerning it with which the court is occupied is that relating to its effect as an estoppel.

**(b) Judgment as bar to action or defense and judgment as proof of matter determined.** A judgment determining a particular matter estops both parties and their privies from denying that matter in a subsequent suit, and, as a corollary, relieves either of them of the necessity which might otherwise rest on him of proving the matter so determined. And at the outset it may be remarked that the matter determined by a judgment may be either (1) a right asserted as founding an action or a defense; (2) a state of facts not constituting a right, but amounting to a defense; or (3) a fact (or a state of facts) constituting neither a right nor a defense.

The question of estoppel by judgment is presented in a variety of ways. They fall generally under two heads, which, for the sake of convenience, may be referred to as two forms

of estoppel by judgment. First, the judgment may be set up as a bar to a right of action or a defense asserted in a subsequent action; second, it may be put forward as establishing a matter not in itself constituting a right of action or a defense in the subsequent action.<sup>5</sup> This second form of estoppel by judgment is sometimes referred to as estoppel by verdict.<sup>6</sup> As has been observed, however, it is not accurate to speak of estoppel "by verdict"; a verdict alone, without a judgment upon it, does not work an estoppel.<sup>7</sup>

The judgment is a bar in the following cases: First. Plaintiff asserts a cause of action resting on a particular right. (a) A judgment in his favor bars the defendant and his privies from asserting that right in a subsequent proceeding, either as a ground of action or defense against the plaintiff or his privies. (b) A judgment against plaintiff bars him and his privies from asserting that right in a subsequent proceeding, either as a ground of action or defense against the defendant or his privies. Second. Defendant asserts a defense resting on a particular right or state of facts. (a) A judgment in his favor bars the plaintiff and his privies from asserting that right or state of facts in a subsequent proceeding, either as a ground of action or defense against the defendant or his privies. (b) A judgment against the defendant bars him and his privies from asserting that right or state of facts in a subsequent proceeding, either as a ground of action or defense against the plaintiff or his privies. It will be observed that in all these cases the right or the state of facts determined in the former suit constitutes the entire foundation of the right of action or defense asserted in the subsequent action.

<sup>5</sup> *Cromwell v. Sac County*, 94 U. S. 351; *Fuller v. Metropolitan L. Ins. Co.*, 68 Conn. 55, 57 A. S. R. 84, 88.

<sup>6</sup> *Bigelow, Estop.* (5th Ed.) 90, and numerous cases.

<sup>7</sup> *Black, Judgm.* § 506; *Dougherty v. Lehigh C. & N. Co.*, 202 Pa. 635, 90 A. S. R. 660.

In the following cases the judgment is offered as a substitute for proof of a matter not in itself constituting a right of action or defense in the subsequent action. Referring first to matters constituting a right of action or defense in the former suit: (1) Plaintiff asserts a cause of action resting on a particular right. (a) A judgment in his favor precludes the defendant from disproving that right by extraneous evidence in any subsequent action between the parties or their privies, even though the right of action or defense asserted in the subsequent suit is not based entirely on the previously determined right. (b) A judgment against the plaintiff precludes him from asserting that right in any subsequent action between the parties or their privies, even though the right of action or defense asserted in the subsequent suit is not based entirely on the previously determined right. (2) Defendant asserts a defense resting on a particular right or state of facts. (a) A judgment in his favor precludes the plaintiff from disproving that right or state of facts by extraneous evidence in any subsequent action between the parties or their privies, even though the right of action or defense asserted in the subsequent suit is not based entirely on the previously determined right or state of facts. (b) A judgment against the defendant precludes him from asserting that right or state of facts in any subsequent action between the parties or their privies, even though the right of action or defense asserted in the subsequent suit is not based entirely on the previously determined right or state of facts. Referring next to facts constituting neither a right nor a defense in the former suit: (1) A judgment determining the existence of a particular fact not in itself constituting a right or defense precludes the parties and their privies from denying that fact, and hence dispenses with extraneous evidence of it, in any subsequent suit, whether or not the two suits involve the same right of action or defense. (2) A judgment determining the nonexistence of a particular fact

not constituting in itself a right or defense precludes the parties and their privies from proving that the fact in truth exists, and hence dispenses with extraneous evidence of its nonexistence in any subsequent suit, whether or not the two suits involve the same right or defense. It will be noticed that in all these cases wherein the judgment operates simply to establish facts independently of extraneous evidence it fails to operate as a bar because the right of action or defense in the subsequent suit does not rest entirely on the right or state of facts previously determined.

The principle of estoppel by judgment is the same, whether the judgment is put forward as a bar to a subsequent right of action or defense, or as a substitute for proof of a matter not in itself constituting a right of action or a defense in the subsequent suit. It has been said, indeed, first, that when the judgment is set up as a bar to the whole controversy, the causes of action in the two suits must be identical, but that it is immaterial that the particular claim asserted in the later case was not determined in the former suit, provided that that claim might have been presented there as a ground of recovery or defense; and second, that when the judgment is offered merely as proof of a particular point, the causes of action in the two suits need not be identical, but that the particular point asserted in the later case must have been actually determined in the former suit. This statement, however, is only partially true, as will be shown in another connection.<sup>8</sup> It fails to distinguish between the primary effect of the principle of estoppel as precluding in all cases any inquiry into the right or facts adjudicated, and its secondary effect as barring in some cases any right of action or defense which is based entirely on the nonexistence of the adjudicated right or facts.

In all cases the primary and immediate effect of the principle

<sup>8</sup> See §§ 148(b), 148(e), *infra*.

of estoppel by judgment is to preclude the parties and their privies from denying a right or a fact which the judgment has determined to exist, or from asserting a right or a fact which the judgment has determined not to exist. The effect is the same, whether the judgment is put forward as a bar to a subsequent action or defense based entirely on the same matter, or whether it is offered as a substitute for proof of some right or fact not in itself constituting the right of action or defense in the subsequent suit. If the entire controversy which forms the subject of the subsequent action was not determined in the first suit, the judgment has only this primary and immediate effect of precluding any inquiry into the matters determined. Certainly, if the judgment disposes of a right or fact that is only incidentally involved in the later suit, the right of action or defense subsequently presented is not barred as an entirety. If, however, the entire controversy which forms the subject of the subsequent action was determined in the former suit, then the judgment is given the further and secondary effect of barring the right of action or defense which presents that controversy. This further and secondary effect as a bar does not, however, rest on any extension or variation of the principle of estoppel. It is only the logical consequence of that principle. The principle of estoppel prevents a relitigation of matters once determined. A given matter is determined, and afterwards put in issue in another suit. If that matter does not found the entire right of action or defense in the later action, then obviously the entire right of action or defense is not barred. If, on the other hand, that matter does entirely found the subsequent right of action or defense, then just as obviously the entire right of action or defense is barred, because there is nothing in issue which the law allows the parties to litigate. But this is not a rule of law, properly speaking; it is merely a logical conclusion arrived at in applying the principle of estoppel. So far as the primary and characteristic effect of that principle is



concerned, there is therefore no distinction between its application to judgments put forward as a bar and judgments offered merely as establishing a matter constituting neither a right of action nor a defense in the subsequent suit.

**(c) Relation of estoppel by judgment to law of evidence.**

Estoppel by judgment, like other forms of estoppel, has no relation to the law of evidence, in the proper sense of that term. The judgment does not constitute evidence of the matter adjudicated;<sup>9</sup> it simply precludes evidence in denial of that matter. In other words, the rule of estoppel, like the rule embodied in a conclusive presumption of law, declares the legal insignificance of the nonexistence of the fact which forms the subject of the estoppel. Of the two forms of estoppel by judgment, however,—estoppel as dispensing with proof and estoppel as a bar,—the former seems to approach the subject of evidence in that, in forbidding the adduction of evidence in denial of some right or fact in question in the two suits, it takes the place of proof of that matter. The latter form of estoppel does not thus serve as a substitute for proof; on the contrary,

<sup>9</sup> The record of the judgment is indeed evidence; but it is evidence, not of the facts adjudicated, but of the adjudication of those facts. When the judgment is proved by the introduction of the record, the record as evidence has served its purpose, and the further effect which the judgment thus proved is given as an estoppel to deny the facts adjudicated is a matter which concerns, not the adjective law of evidence, but the substantive law of judgments.

Evidence is that which has a tendency to prove a fact in issue. Proof is that degree of evidence which produces conviction of the existence of the fact. Proof, therefore, necessarily presupposes the existence of evidence, but evidence does not necessarily constitute proof. Evidence is merely a means of proof. Proof is the object of evidence. When, therefore, it is said that the judgment is offered "as evidence" of the facts adjudicated, it is to employ the term "evidence" in a loose sense. Practically, indeed, the judgment operates as a substitute for proof of those facts; but it does this, not because it tends to prove them, but because the policy of the law does not allow the merits of the adjudication to be questioned.

it goes to the subsequent right of action or defense. The one relates to issuable facts which, but for the judgment, would have to be proved; the other relates solely to the subsequent right of action or defense. One relates to the vitality of a judgment in preserving for evidential purposes a right or fact once found; the other relates to the finality of a judgment as disposing of a cause of action or ground of defense.<sup>10</sup>

— **Scope of present article.** This distinction may be enforced by illustration. Given a judgment in a previous suit between the same parties or their privies, how do these two forms of estoppel operate? If some fact on which issue is taken appears to have been determined in a previous suit, the judgment precludes an inquiry into the merits of that determination, and in effect establishes the fact. The party who asserts the fact is thus absolutely relieved of the necessity which would, but for the judgment, require him to prove it. Practically, therefore, in such cases, the judgment stands for proof, and it is only natural that it should be associated with the law of evidence. This form of estoppel by judgment will accordingly receive attention in the following pages. Taking up the second form, if the two suits are based entirely on the same cause of action or involve the same defense, and the claim asserted in the latter might successfully have been urged in the former, the judgment does not serve for proof of any fact in issue in the second suit, and this is so, whether or not the plea of former adjudication is the only plea, and even though (as the practice in some states allows) the judgment is not pleaded at all, but is offered under the general issue. If the plea of former adjudication is alone interposed, there is no particular fact in issue of which the judgment serves for proof. Its only effect, direct or indirect, is to bar the right of action or defense. The same is true where other pleas also are inter-

<sup>10</sup> Fuller v. Metropolitan L. Ins. Co., 68 Conn. 55, 57 A. S. R. 84, 89.

posed with the plea of former adjudication. The judgment has no effect on the facts put in issue by the other pleas save to render those issues immaterial. And even where the former adjudication is asserted under a plea of the general issue, yet in those states where a judgment so offered operates as a bar, its effect is the same. It does not stand for proof of any fact put in issue by that plea. It merely renders the issue immaterial,—virtually declaring that, even if those facts do exist, they give no right to relief because the matter has been once solemnly adjudicated. A judgment thus offered as an estoppel does not, therefore, in any aspect of the case, relate to or resemble evidence in any sense of the term, and, so far as rules peculiar to judgments as a bar are concerned, the subject may therefore be dismissed from further discussion.

**§ 146. Requisites of judgment.**

(a) **Character of court.** To create an estoppel, a judgment must have been rendered by a legally constituted court.<sup>11</sup> This rule, however, is subject to some qualifications. An award of arbitrators stands on the same footing with a judgment in respect of its conclusiveness as an estoppel in a subsequent proceeding in a court of justice;<sup>12</sup> and the same is true of quasi judicial decisions of the United States land office,<sup>13</sup> and of certain other officers, federal<sup>14</sup> and local.<sup>15</sup>

<sup>11</sup> *Rogers v. Wood*, 2 Barn. & Adol. 245.

<sup>12</sup> *Bulkley v. Stewart*, 1 Day (Conn.) 130, 2 A. D. 57; *Shackelford v. Purket*, 2 A. K. Marsh. (Ky.) 435, 12 A. D. 422; *Brazill v. Isham*, 13 N. Y. 9; *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 A. D. 522; *Davis v. Havard*, 15 Serg. & R. (Pa.) 165, 16 A. D. 537. In some states an award does not of itself work an estoppel. There must be a judgment entered on it. *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.) 18, 80 A. D. 49.

<sup>13</sup> *Moore v. Robbins*, 96 U. S. 530, 535; *Robbins v. Bunn*, 54 Ill. 48, 5 A. R. 75; *Boatner v. Ventress*, 8 Mart. (N. S.; La.) 644, 20 A. D. 266; *Pin v. Morris*, 1 Or. 230; *Lamont v. Stimson*, 3 Wis. 545, 62 A. D. 696.

If jurisdiction of the subject-matter and of the parties appears on the face of the proceedings, the judgment of a court of inferior jurisdiction, such, for instance, as a justice of the peace, is conclusive, in a subsequent action, of the facts determined by it, the same as the judgment of a superior court.<sup>16</sup> According to the modern and better opinion, foreign judgments in personam are generally conclusive as an estoppel, the same as domestic judgments;<sup>17</sup> and the rule is the same with regard to sister-state judgments.<sup>18</sup>

(b) **Validity of judgment.** A void judgment, as distinguished from one which is either merely voidable or merely erroneous, does not work an estoppel.<sup>19</sup> Thus, if the court had no jurisdiction over the subject-matter of the action<sup>20</sup> or the parties,<sup>21</sup> or if it assumed to decide matters outside the actual issues, and so not presented to it for decision,<sup>22</sup> its judgment is a nullity, and of no effect in a subsequent action. If, how-

<sup>14</sup> Comptroller of the currency. *Casey v. Galli*, 94 U. S. 673. Appraiser and collector of customs. *U. S. v. McDowell*, 21 Fed. 563.

<sup>15</sup> *Huntington County Com'rs v. Heaston*, 144 Ind. 583, 55 A. S. R. 192 (semble); *Osterhoudt v. Rigney*, 98 N. Y. 222.

<sup>16</sup> *Wiese v. San Francisco M. F. Soc.*, 82 Cal. 645, 7 L. R. A. 577; *Hallock v. Dominy*, 69 N. Y. 238; *Ludwick v. Fair*, 29 N. C. (7 Ired.) 422, 47 A. D. 333; *Marsteller v. Marsteller*, 132 Pa. 517, 19 A. S. R. 604.

<sup>17</sup> *Black*, Judgm. §§ 827, 829, 834; *Fisher v. Fielding*, 67 Conn. 91, 52 A. S. R. 270; *Dunstan v. Higgins*, 138 N. Y. 70, 34 A. S. R. 431.

<sup>18</sup> *Black*, Judgm. § 856 et seq.; *Semple v. Glenn*, 91 Ala. 245, 24 A. S. R. 894; *Andrews v. Montgomery*, 19 Johns. (N. Y.) 162, 10 A. D. 213; *Evans v. Tatem*, 9 Serg. & R. (Pa.) 252, 11 A. D. 717.

<sup>19</sup> *Springer v. Shavender*, 118 N. C. 33, 54 A. S. R. 708; *Agnew v. Adams*, 26 S. C. 101; *In re Christensen*, 17 Utah, 412, 70 A. S. R. 794 (semble).

<sup>20</sup> *Elliott v. Peirsol's Lessee*, 1 Pet. (U. S.) 328, 340; *Gage v. Hill*, 43 Barb. (N. Y.) 44; *Wall v. Wall*, 123 Pa. 545, 10 A. S. R. 549; *Houston v. Musgrove*, 35 Tex. 594; *Taylor v. Mut. R. F. L. Ass'n*, 97 Va. 60, 45 L. R. A. 621.

<sup>21</sup> *Black*, Judgm. § 513.

<sup>22</sup> *Lincoln Nat. Bank v. Virgin*, 36 Neb. 735, 38 A. S. R. 747; *Munday v. Vall*, 34 N. J. Law, 418.

ever, the judgment is merely voidable, as, for instance, because of some irregularity in the proceedings, or if it is merely erroneous, as where it is legally incorrect, and might therefore have been modified or reversed by a court of review, in such cases the adjudication is not void, and, so long as it stands, it may be conclusive, in a subsequent action, of the facts involved in the decision.<sup>23</sup>

(c) **Finality of judgment.** To give rise to an estoppel, the judgment must be final. Interlocutory judgments or orders, being subject to the power of the court to vacate or modify at any time pending the action, are not conclusive in an independent suit.<sup>24</sup> Final orders as well as judgments are conclusive,<sup>25</sup> however, but the doctrine of *res judicata* is not applied to orders with the same strictness as to judgments.<sup>26</sup>

Whether the pendency of an appeal or a proceeding in error suspends the operation of the judgment as an estoppel is a question on which there is a contrariety of opinion. In some states the sole effect of the proceeding for review is to suspend execution of the judgment, which may accordingly operate as an estoppel in an independent action so long as it remains un-

<sup>23</sup> *Black, Judgm.* § 513; *Elliott v. Peirsol's Lessee*, 1 Pet. (U. S.) 323, 340; *Semple v. Glenn*, 91 Ala. 245, 24 A. S. R. 894; *People v. Holladay*, 93 Cal. 241, 27 A. S. R. 186; *Barrick v. Horner*, 78 Md. 253, 44 A. S. R. 283; *Hodson v. Union Pac. R. Co.*, 14 Utah, 402, 60 A. S. R. 902; *Hart v. Moulton*, 104 Wis. 349, 76 A. S. R. 881 (semble).

<sup>24</sup> *Gage v. Gunther*, 136 Cal. 338, 89 A. S. R. 141; *Rockwell v. District Court*, 17 Colo. 118, 31 A. S. R. 265; *Fuller v. Metropolitan L. Ins. Co.*, 68 Conn. 55, 57 A. S. R. 84; *Blair v. Anderson*, 58 Kan. 97, 62 A. S. R. 606; *Webb v. Buckelew*, 82 N. Y. 555; *Scherff v. Missouri Pac. R. Co.*, 81 Tex. 471, 26 A. S. R. 828.

<sup>25</sup> *Sunkler v. McKenzie*, 127 Cal. 554, 78 A. S. R. 86; *Truesdale v. Farmers' L. & T. Co.*, 67 Minn. 454, 64 A. S. R. 430; *White v. Ladd*, 41 Or. 324, 93 A. S. R. 732; *Burner v. Hevener*, 34 W. Va. 774, 26 A. S. R. 948.

<sup>26</sup> *Clopton v. Clopton*, 10 N. D. 569, 88 A. S. R. 749; *White v. Ladd*, 41 Or. 324, 93 A. S. R. 732, 739.

reversed.<sup>27</sup> In other states, a contrary view is taken, and an estoppel does not arise until the proceeding for review is determined.<sup>28</sup> A notice of intention to move for a new trial does not thus suspend the operation of the judgment as an estoppel.<sup>29</sup>

If a judgment has been vacated by the court which rendered it,<sup>30</sup> or reversed in proceedings for review,<sup>31</sup> it becomes a nullity and does not work an estoppel.

§ 147. Persons estopped and entitled to urge estoppel.

(a) **General rule.** A judgment works an estoppel as between the parties to the action and their privies.<sup>32</sup> "Parties, in

<sup>27</sup> *Cloud v. Wiley*, 29 Ark. 80; *Burton v. Burton*, 28 Ind. 342; *Watson v. Richardson*, 110 Iowa, 698, 80 A. S. R. 331 (statute); *Young v. Brehe*, 19 Nev. 379, 3 A. S. R. 892, 895 (semble); *Parkhurst v. Berdell*, 110 N. Y. 386, 6 A. S. R. 384; *Oregonian R. Co. v. Oregon R. & Nav. Co.*, 27 Fed. 277 (Oregon); *Thompson v. Griffin*, 69 Tex. 139. See, also, *Moore v. Williams*, 132 Ill. 589, 22 A. S. R. 563; *Paine v. Schenectady Ins. Co.*, 11 R. I. 411.

If the judgment is reversed after it has been received in evidence, the adversary may move for a new trial of the action in which it was thus admitted. *Parkhurst v. Berdell*, 110 N. Y. 386, 6 A. S. R. 384.

<sup>28</sup> *Brown v. Campbell*, 100 Cal. 635, 38 A. S. R. 314; *Sharon v. Hill*, 26 Fed. 337 (California); *Glenn v. Brush*, 3 Colo. 26; *Byrne v. Prather*, 14 La. Ann. 653; *Day v. De Jonge*, 66 Mich. 550; *Ketchum v. Thatcher*, 12 Mo. App. 185; *Sherman v. Dilley*, 3 Nev. 21 (semble); *Haynes v. Ordway*, 52 N. H. 284; *Souter v. Baymore*, 7 Pa. 415, 47 A. D. 518; *Small v. Haskins*, 26 Vt. 209.

<sup>29</sup> *Young v. Brehe*, 19 Nev. 379, 3 A. S. R. 892.

<sup>30</sup> *Black*, Judgm. § 511.

<sup>31</sup> *Regina v. Drury*, 3 Car. & K. 190; *Gilbert v. American Surety Co.*, 121 Fed. 499, 61 L. R. A. 253; *Smith v. Frankfield*, 77 N. Y. 414.

<sup>32</sup> This rule applies against the state, as well as against individuals. *Cunningham v. Shanklin*, 60 Cal. 118; *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 716. *Contra*, *State v. Williams*, 94 N. C. 891.

It has been held, however, that a judgment against a state officer as such does not estop the state on the principle of *res judicata*. *Peck v. State*, 137 N. Y. 372, 33 A. S. R. 738.

the larger legal sense, are all persons having a right to control the proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from the decision, if any appeal lies."<sup>33</sup>

The estoppel arises only between the parties to the judgment and those in privity with them. Unless the parties to the subsequent suit or their privies were parties to the action in which the judgment was rendered, the adjudication is not conclusive on the facts. Only the parties and their privies are entitled to urge the estoppel; only the parties and their privies are bound by it. Strangers to the former litigation are not concluded by the judgment, nor are they entitled to take advantage of it. The judgment must be mutually binding on the parties to the suit in which it is offered as a substitute for proof, else an estoppel does not arise.<sup>34</sup>

Either party to a judgment may urge it as an estoppel. *Bank of Mobile v. Mobile & O. R. Co.*, 69 Ala. 305.

<sup>33</sup> 1 *Greenleaf*, Ev. § 535; *Cecil v. Cecil*, 19 Md. 72, 81 A. D. 626; *Lipscomb v. Postell*, 38 Miss. 476, 77 A. D. 651; *Ashton v. Rochester*, 133 N. Y. 187, 28 A. S. R. 619; *Walker v. Philadelphia*, 195 Pa. 168, 78 A. S. R. 801. See, also, *Brown v. Chaney*, 1 Kelly (Ga.) 410, 412.

One who testifies as a witness in the suit in which the judgment is rendered is not, therefore, concluded by the adjudication. *Wright v. Andrews*, 130 Mass. 149; *Blackwood v. Brown*, 32 Mich. 104; *Yorks v. Steele*, 50 Barb. (N. Y.) 397. Nor does a stranger to a judgment affecting his interests become bound by prosecuting a fruitless appeal from it. *Majors v. Cowell*, 51 Cal. 478.

The fact that one who has no right to control the action or appeal from the decision is joined as a nominal party plaintiff does not bring him within the operation of the judgment as an estoppel. *Stoops v. Woods*, 45 Cal. 439; *Walker v. Phila.*, 195 Pa. 168, 78 A. S. R. 801. However, a party defendant of record is entitled to take advantage of an estoppel by the judgment against the plaintiff, although he did not appear and defend. *Harrison v. Walton*, 95 Va. 721, 64 A. S. R. 830.

<sup>34</sup> ENGLAND: *Rex v. Duchess of Kingston*, 20 How. State Tr. 355, 2 *Smith's Lead. Cas.* (11th Ed.) 731.

UNITED STATES: *Mut. B. L. Ins. Co. v. Tisdale*, 91 U. S. 238.

ALABAMA: *State v. Williams*, 131 Ala. 56, 90 A. S. R. 17.

ARKANSAS: *Roulston v. Hall*, 66 Ark. 305, 74 A. S. R. 97.

This rule is applied in civil cases wherein a judgment in a criminal case is put forward as creating an estoppel, and vice versa. While a judgment of conviction for crime is conclusive of the fact of conviction, yet it is not conclusive of the fact of guilt in a subsequent civil suit between the accused and a party other than the state, since the parties to the two actions are not

CALIFORNIA: *Clarke v. Perry*, 5 Cal. 58, 63 A. D. 82.

CONNECTICUT: *Fuller v. Metropolitan L. Ins. Co.*, 68 Conn. 55, 57 A. S. R. 84.

GEORGIA: *Brady v. Brady*, 71 Ga. 71.

ILLINOIS: *Thompson v. Maloney*, 199 Ill. 276, 93 A. S. R. 133.

INDIANA: *Huntington County Com'rs v. Heaston*, 144 Ind. 583, 55 A. S. R. 192.

MARYLAND: *Cecil v. Cecil*, 19 Md. 72, 81 A. D. 626.

MASSACHUSETTS: *Vose v. Morton*, 4 Cush. 27, 50 A. D. 750.

MICHIGAN: *Van Kleeck v. Hammell*, 87 Mich. 599, 24 A. S. R. 182.

MINNESOTA: *Hoerr v. Melhofer*, 77 Minn. 228, 77 A. S. R. 674.

MISSISSIPPI: *Adams v. Yazoo & M. V. R. Co.*, 77 Miss. 194, 60 L. R. A. 33.

MISSOURI: *State v. Branch*, 134 Mo. 592, 56 A. S. R. 533.

NEW HAMPSHIRE: *Lawrence v. Haynes*, 5 N. H. 33, 20 A. D. 554.

NEW JERSEY: *Babcock v. Standish*, 53 N. J. Eq. 376, 51 A. S. R. 633.

NEW YORK: *Thompson v. Clark*, 4 Hun. 164.

NORTH CAROLINA: *Springer v. Shavender*, 118 N. C. 33, 54 A. S. R. 708.

SOUTH CAROLINA: *Mauldin v. City Council*, 53 S. C. 285, 69 A. S. R. 855 (semble).

TEXAS: *Freeman v. Hawkins*, 77 Tex. 498, 19 A. S. R. 769.

VERMONT: *Nason v. Blaisdell*, 12 Vt. 165, 36 A. D. 331.

WEST VIRGINIA: *Wilson v. Phoenix P. Mfg. Co.*, 40 W. Va. 413, 52 A. S. R. 890 (semble).

WISCONSIN: *Cameron v. Cameron*, 15 Wis. 1, 82 A. D. 652.

A party is not concluded by a judgment unless he could have taken advantage of it had it gone the other way; and he is not entitled to urge the judgment as an estoppel unless he would have been concluded by a contrary decision. *State v. Branch*, 134 Mo. 592, 605, 56 A. S. R. 533, 541; *Moore v. Albany*, 98 N. Y. 396, 409; *Walker v. Phila.*, 195 Pa. 168, 78 A. S. R. 801.

If a judgment estops one party, it must necessarily estop the other, since mutuality is essential. *Bridges v. McAlister*, 106 Ky. 791, 90 A. S. R. 267; *Tibbetts v. Shapleigh*, 60 N. H. 487, 491.



the same;<sup>35</sup> nor is a judgment of acquittal conclusive of the accused's innocence in a subsequent civil action.<sup>36</sup> In a subsequent civil suit between the accused and the state, however, the parties being the same, the judgment in the criminal case may work an estoppel;<sup>37</sup> and a judgment of conviction is conclusive in a subsequent prosecution of the same defendant.<sup>38</sup> A judgment in a civil action is not conclusive as an estoppel in a subsequent criminal prosecution against one of the parties;<sup>39</sup> nor is it conclusive on the defendant in a subsequent penal action, even between the same parties, because the measure of evidence required to produce conviction in the minds of the jury in the two actions is different.<sup>40</sup>

An exception to the rule that none but parties and privies are estopped by a judgment or entitled to urge the estoppel exists in the case of a judgment in rem. Such a judgment is conclusive against any person in any subsequent controversy where the grounds of the adjudication become relevant or material facts.<sup>41</sup>

One who relies on a judgment as an estoppel cannot dispute a material fact on which it is founded. *Buford v. Adair*, 43 W. Va. 211, 64 A. S. R. 854. See, generally as to parties concluded, 6 *Current Law*, 1505.

<sup>35</sup> *Petrie v. Nuttall*, 11 Exch. 569; *Clark v. Irvin*, 9 Ohio, 131; *Quinn v. Quinn*, 16 Vt. 426.

<sup>36</sup> *Carlisle v. Killebrew*, 89 Ala. 329, 6 L. R. A. 617; *Corbley v. Wilson*, 71 Ill. 209, 22 A. R. 98; *Fowle v. Child*, 164 Mass. 210, 49 A. S. R. 451; *Cluff v. Mut. B. L. Ins. Co.*, 99 Mass. 317. And see *Summers v. Bergner Brew. Co.*, 143 Pa. 114, 24 A. S. R. 518.

<sup>37</sup> *Coffey v. U. S.*, 116 U. S. 436; *State v. Adams*, 72 Vt. 253, 82 A. S. R. 937. See *U. S. v. Schneider*, 35 Fed. 107; *State v. Meek*, 112 Iowa, 338, 51 L. R. A. 414.

<sup>38</sup> *Com. v. Feldman*, 131 Mass. 588.

<sup>39</sup> *Britton v. State*, 77 Ala. 202. See, however, *Dorrell v. State*, 83 Ind. 357.

<sup>40</sup> *Riker v. Hooper*, 35 Vt. 457, 82 A. D. 646.

<sup>41</sup> *Black*, *Judgm.* §§ 602, 795 et seq.; *State v. Voorhies*, 39 La. Ann. 499, 4 A. S. R. 274; *Redmond v. Collins*, 15 N. C. (4 Dev.) 430, 27 A. D. 208; *Street v. Augusta I. & B. Co.*, 12 Rich. Law (S. C.) 13, 75 A.

(b) **Real and nominal parties.** Generally speaking, the parties to a judgment are those whose names appear on the record as such; but the presence of the name on the record is not the sole or exclusive test. A person may be estopped by a judgment, even though he is not a nominal party to the cause in which it was rendered. If the real party in interest in the two suits is the same, the judgment in the former action is admissible in the latter, although the nominal party is different.<sup>42</sup>

Under certain conditions, one not a nominal party may be estopped by the judgment if he assumed the defense of the action.<sup>43</sup> The conditions on which this rule is applied are

D. 714; *Steele v. Renn*, 50 Tex. 467, 32 A. R. 605; *Schultz v. Schultz*, 10 Grat. (Va.) 358, 60 A. D. 335; *State v. McDonald*, 108 Wis. 8, 81 A. S. R. 878.

This effect as to persons not parties or privies belongs only to judgments strictly in rem, as distinguished from those quasi in rem. *Black, Judgm. §§ 638, 793, 795.*

Except as to his interest in the property formerly in suit, a judgment in rem does not, in another action, conclude one of whose person jurisdiction was not obtained. *Durant v. Abendroth*, 97 N. Y. 132.

The text is applicable, as a rule, also to foreign and sister state judgments in rem. *Black, Judgm. §§ 813 et seq., 922 et seq.*

<sup>42</sup> *Cole v. Favorite*, 69 Ill. 457; *Burns v. Gavin*, 118 Ind. 320; *Bridges v. McAllister*, 106 Ky. 791, 90 A. S. R. 267; *Rogers v. Haines*, 3 Me. 362; *Landis v. Hamilton*, 77 Mo. 554; *Ballou v. Ballou*, 110 N. Y. 394. *Contra, Allin's Heirs v. Hall's Heirs*, 1 A. K. Marsh. (Ky.) 525.

However, the mere fact that a person had an interest in the questions involved in the former action, and had notice of its pendency, does not bring him within the operation of the judgment as a real party in interest. *Lower Latham Ditch Co. v. Loudon Irr. C. Co.*, 27 Colo. 267, 83 A. S. R. 80.

A person not a party to an action may, by participating in its prosecution, become bound by the judgment therein by estoppel in pais. *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95, 24 A. S. R. 189.

<sup>43</sup> *Lovejoy v. Murray*, 3 Wall. (U. S.) 1; *Tootle v. Coleman*, 107 Fed. 41, 57 L. R. A. 120; *Tyrrell v. Baldwin*, 67 Cal. 1; *Conger v. Chilcote*, 42 Iowa, 18; *Parr v. State*, 71 Md. 220; *Estelle v. Peacock*, 48 Mich. 469; *Nichols v. Day*, 32 N. H. 133, 64 A. D. 358; *Kip v. Brigham*, 6 Johns. (N. Y.) 158.

two:<sup>44</sup> First. The person assuming the defense must not have been a mere intermeddler. He must have had an interest in the subject-matter of the litigation or else he must have occupied such a position that, if the defense had failed, he would have been liable over to the nominal defendant because of some obligation, express or implied, by which he was bound to him.<sup>45</sup> Second. The defense must have been undertaken and conducted openly and with notice to the adverse party.<sup>46</sup>

— **Persons liable over.** If a person is responsible over to another, either by operation of law or by express contract, and notice has been given him to come in and defend a suit against the latter, whether or not he does so, he is estopped by the judgment thereafter rendered.<sup>47</sup> An illustration of liability

<sup>44</sup> Black, Judgm. § 540; Cent. Baptist Church v. Manchester, 17 R. I. 492, 33 A. S. R. 893.

<sup>45</sup> Cannon River Mfrs' Ass'n v. Rogers, 42 Minn. 123, 18 A. S. R. 497.

<sup>46</sup> Lacroix v. Lyons, 33 Fed. 437; Cannon River Mfrs' Ass'n v. Rogers, 42 Minn. 123, 18 A. S. R. 497.

<sup>47</sup> Hagerthy v. Bradford, 9 Ala. 567; Davis v. Smith, 79 Me. 351; Olson v. Schultz, 67 Minn. 494, 64 A. S. R. 437; Mo. Pac. R. Co. v. Twiss, 35 Neb. 267, 37 A. S. R. 437; Oceanic S. Nav. Co. v. Compania T. E., 134 N. Y. 461, 30 A. S. R. 685; Mehaffy v. Lytle, 1 Watts (Pa.) 314; Spencer v. Dearth, 43 Vt. 106.

This principle does not apply to cases where one is defending his own wrong or his own contract, although another may be responsible to him. Consol. H. M. L. Mach. Co. v. Bradley, 171 Mass. 127, 68 A. S. R. 409.

The rule is the same, although the person liable over is a nonresident of the state wherein the first action is brought. First Nat. Bank v. City Nat. Bank, 182 Mass. 130, 94 A. S. R. 637; Konitzky v. Meyer, 49 N. Y. 571.

The judgment does not ordinarily estop the person who has been notified to defend from denying, in the subsequent suit against him, that he is in fact liable over to the judgment defendant. The liability over is not ordinarily in issue in the first action, and must therefore be established by independent evidence in the subsequent suit. Boston v. Worthington, 10 Gray (Mass.) 496, 71 A. D. 678; St. Joseph v. Union R. Co., 116 Mo. 636, 38 A. S. R. 626; Littleton v. Richardson, 34 N. H.

over by operation of law occurs where a judgment is recovered against a municipal corporation for injuries caused by a defect or obstruction in a highway for which a third person is responsible. If the real culprit was notified of the action, the judgment is conclusive on him as to the fact, the cause, and the extent of the injury, in an action by the municipality to enforce his liability.<sup>48</sup>

Indemnitors are an illustration of a class of persons who are liable over by contract. They may be concluded by a judgment against their principal.<sup>49</sup> If the covenant makes the indemnitor's liability dependent on the result of litigation to which he is not a party, and stipulates that he shall abide the event, he is estopped by the judgment, even though he had no notice of the suit.<sup>50</sup> If, however, the covenant is merely one of indemnity against claims or suits, he must have had notice of suit, else the judgment does not estop him.<sup>51</sup>

179, 66 A. D. 759; *Oceanic S. Nav. Co. v. Compania T. E.*, 134 N. Y. 461, 30 A. S. R. 685.

<sup>48</sup> *Portland v. Richardson*, 54 Me. 46, 89 A. D. 720; *Millford v. Holbrook*, 9 Allen (Mass.) 17, 85 A. D. 735; *Boston v. Worthington*, 10 Gray (Mass.) 496, 71 A. D. 678; *St. Joseph v. Union R. Co.*, 116 Mo. 636, 38 A. S. R. 626; *Lincoln v. First Nat. Bank (Neb.)* 60 L. R. A. 923; *Littleton v. Richardson*, 34 N. H. 179, 66 A. D. 759; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Pawtucket v. Bray*, 20 R. I. 17, 78 A. S. R. 837.

Express notice of the action against the municipality is not necessary to make the judgment therein binding on the person liable over. It is sufficient if he knew of the action and had an opportunity to defend it. *Robbins v. Chicago*, 4 Wall. (U. S.) 657; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550.

<sup>49</sup> *Clark's Ex'rs v. Carrington*, 7 Cranch (U. S.) 308; *Woodworth v. Gorsline*, 30 Colo. 186, 58 L. R. A. 417; *Baxter v. Myers*, 85 Iowa, 328, 39 A. S. R. 298; *Rapelye v. Prince*, 4 Hill (N. Y.) 119, 40 A. D. 267; *Miller v. Rhoades*, 20 Ohio St. 494; *Mehaffy v. Lytle*, 1 Watts (Pa.) 314. *Contra*, *King v. Norman*, 4 C. B. 884.

The rule is the same as to implied contracts of indemnity. *Konitzky v. Meyer*, 49 N. Y. 571.

<sup>50</sup> *Bridgeport F. & M. Ins. Co. v. Wilson*, 34 N. Y. 275.

Warrantors also are liable over by contract. If the warrantor of title to real estate is vouched in to defend an action for the land against the warrantee, or if he voluntarily appears to defend it, a judgment for plaintiff affords conclusive evidence, in a subsequent action for breach of warranty, of eviction of the warrantee by paramount title.<sup>52</sup> The rule is the same where the warrantee sues a third person, who asserts a paramount title. The warrantor may be vouched in to prosecute, and a judgment for the defendant estops the warrantor, when sued on his covenant, to deny that the warrantee was evicted under a paramount title.<sup>53</sup> If the warrantor is not notified of the suit, and if he does not voluntarily come in and defend or prosecute, as the case may be, he is not thus estopped by the adverse judgment.<sup>54</sup>

<sup>51</sup> *Robinson v. Baskins*, 53 Ark. 330, 22 A. S. R. 202; *Bridgeport F. & M. Ins. Co. v. Wilson*, 34 N. Y. 275.

A request to assume the defense, in addition to a notice of the suit, is not necessary. *Drennan v. Bunn*, 124 Ill. 175, 7 A. S. R. 354; *Carroll v. Nodine*, 41 Or. 412, 93 A. S. R. 743.

<sup>52</sup> *Belden v. Seymour*, 8 Conn. 304, 21 A. D. 661; *Chicago & N. W. R. Co. v. N. L. Packet Co.*, 70 Ill. 217, 220 (semble); *Bever v. North*, 107 Ind. 544; *Davenport v. Muir*, 3 J. J. Marsh. (Ky.) 310, 20 A. D. 143; *Chamberlain v. Preble*, 11 Allen (Mass.) 370; *Mason v. Kellogg*, 38 Mich. 132; *Terry's Ex'r v. Drabenstadt*, 68 Pa. 400; *Williams v. Burg*, 9 Lea (Tenn.) 455; *Wendel v. North*, 24 Wis. 223. *Contra*, *Wilder v. Ireland*, 53 N. C. (8 Jones) 86, 88 (semble).

The same is true of a covenant for quiet enjoyment. *Kelly v. Dutch Church*, 2 Hill (N. Y.) 105 (semble); *Adams v. Conover*, 22 Hun (N. Y.) 424. *Contra*, *Martin v. Cowles*, 19 N. C. (2 Dev. & Bat.) 101.

The same is true of a covenant against incumbrances. *St. Louis v. Bissell*, 46 Mo. 157; *Andrews v. Davison*, 17 N. H. 413, 43 A. D. 606.

The same rule applies in the case of a sale of personal property with warranty of title, express or implied. *Salle v. Light's Ex'rs*, 4 Ala. 700, 39 A. D. 317; *Barney v. Dewey*, 13 Johns. (N. Y.) 224, 7 A. D. 372. See, however, *Shober v. Robinson*, 6 N. C. (2 Murph.) 33.

<sup>53</sup> *Gragg v. Richardson*, 25 Ga. 566, 71 A. D. 190; *Andrews v. Denison*, 16 N. H. 469, 43 A. D. 565; *Brown v. Taylor*, 18 Vt. 631, 37 A. D. 618. *Contra*, *Ferrell v. Adler*, 8 Humph. (Tenn.) 43.

(c) **Corporate parties.** Stockholders in a private corporation are represented by the corporation, and, accordingly, a judgment against it is conclusive on them as to the existence and validity of the claim in suit.<sup>55</sup> A judgment for or against a municipal corporation concerning a public matter is likewise conclusive on, and may be taken advantage of by, the citizens thereof.<sup>56</sup>

(d) **Coparties.** A judgment for or against several parties

<sup>54</sup> *Clements v. Collins*, 59 Ga. 124; *Sisk v. Woodruff*, 15 Ill. 15; *Walton v. Cox*, 67 Ind. 164; *Ryerson v. Chapman*, 66 Me. 557; *Mason v. Kellogg*, 38 Mich. 132, 139; *Wallace v. Pereles*, 109 Wis. 316, 53 L. R. A. 644.

The rule is the same as to a warrantor of personalty. *Salle v. Light's Ex'rs*, 4 Ala. 700, 39 A. D. 317; *Stephens v. Jack*, 3 Yerg. (Tenn.) 403, 24 A. D. 583.

If notice is given to the warrantor, who dies pending suit, the judgment sustaining the paramount title is conclusive against his personal representatives, even though no notice was given them. *Brown v. Taylor*, 13 Vt. 631, 37 A. D. 618.

<sup>55</sup> *Hawkins v. Glenn*, 131 U. S. 319; *Howard v. Glenn*, 85 Ga. 238, 21 A. S. R. 156; *Singer v. Hutchinson*, 183 Ill. 606, 75 A. S. R. 133; *Gaskill v. Dudley*, 6 Metc. (Mass.) 546, 39 A. D. 750; *Mut. F. Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 62 A. S. R. 693; *Com. M. F. Ins. Co. v. Hayden*, 60 Neb. 636, 83 A. S. R. 545; *Howarth v. Angle*, 162 N. Y. 179, 47 L. R. A. 725; *State v. McDonald*, 108 Wis. 8, 81 A. S. R. 878, 881 (semble). But one may show he is not in fact a stockholder, *Semple v. Glenn*, 91 Ala. 245, 24 A. S. R. 894. See, also, *Nickum v. Burckhardt*, 30 Or. 464, 60 A. S. R. 822; *Wilson v. Pittsburgh & Y. Coal Co.*, 43 Pa. 424; *Clausen v. Head*, 110 Wis. 405, 84 A. S. R. 933.

<sup>56</sup> *People v. Holladay*, 93 Cal. 241, 27 A. S. R. 186; *Sauls v. Freeman*, 24 Fla. 209, 12 A. S. R. 190; *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 5 A. S. R. 502; *Clark v. Wolf*, 29 Iowa, 197; *State v. Rainey*, 74 Mo. 229; *Ashton v. Rochester*, 133 N. Y. 187, 28 A. S. R. 619; *Bear v. Brunswick County Com'rs*, 122 N. C. 434, 65 A. S. R. 711; *Stallcup v. Tacoma*, 13 Wash. 141, 52 A. S. R. 25; *State v. McDonald*, 108 Wis. 8, 81 A. S. R. 878, 881 (semble); *Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 369, 71 A. S. R. 926. See, however, *Long v. Wilson*, 119 Iowa, 267, 60 L. R. A. 720.

does not work an estoppel in favor of either against the other as to their rights and liabilities inter se,<sup>57</sup> unless they were adversary parties as to the issues on which the judgment rests.<sup>58</sup> Nor is a plaintiff estopped by a judgment on an issue litigated between two defendants, but not presented by the complaint.<sup>59</sup>

(e) **Additional parties.** As between persons who were and are parties to both suits, the judgment may be conclusive, although other persons also were or are parties to one or the other of the two actions.<sup>60</sup>

(f) **Severance of parties.** If the action is dismissed or discontinued as to one of several defendants, he is not estopped by the judgment subsequently rendered.<sup>61</sup> So, if the defendants have separate trials, the judgment rendered in one trial does not work an estoppel in the other.<sup>62</sup> And if one of several defendants removes to a federal court so much of the cause as relates to him, he is not estopped by the judgment subsequently rendered in the state court.<sup>63</sup>

<sup>57</sup> *Buffington v. Cook*, 35 Ala. 312, 73 A. D. 491; *Bulkeley v. House*, 62 Conn. 459, 21 L. R. A. 247; *Dent v. King*, 1 Ga. 200, 44 A. D. 638; *Jones v. Vert*, 121 Ind. 140, 16 A. S. R. 379; *Walters v. Wood*, 61 Iowa, 290; *Pioneer S. & L. Co. v. Bartsch*, 51 Minn. 474, 38 A. S. R. 511; *McMahan v. Geiger*, 73 Mo. 145, 39 A. R. 489; *Beveridge v. N. Y. El. R. Co.*, 112 N. Y. 1, 2 L. R. A. 648; *Chrisman's Adm'x v. Harman*, 29 Grat. (Va.) 494, 26 A. R. 387. See, however, *Lloyd v. Barr*, 11 Pa. 41.

<sup>58</sup> *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 5 A. S. R. 502; *Nave v. Adams*, 107 Mo. 414, 28 A. S. R. 421; *Parkhurst v. Berdell*, 110 N. Y. 386, 6 A. S. R. 384.

<sup>59</sup> *Pitts v. Oliver*, 13 S. D. 561, 79 A. S. R. 907.

<sup>60</sup> *Thompson v. Roberts*, 24 How. (U. S.) 233; *Hanna v. Read*, 102 Ill. 596, 40 A. R. 608; *Davenport v. Barnett*, 51 Ind. 329; *Larum v. Wilmer*, 35 Iowa, 244; *State v. Branch*, 134 Mo. 592, 56 A. S. R. 533; *Dyett v. Hyman*, 129 N. Y. 351, 26 A. S. R. 533, 537.

<sup>61</sup> *Berber v. Kerzinger*, 23 Ill. 346.

<sup>62</sup> *Eikenberry v. Edwards*, 71 Iowa, 82; *Handley v. Jackson*, 31 Or. 552, 65 A. S. R. 839.

<sup>63</sup> *State v. Tiedermann*, 10 Fed. 20.

(g) **Parties in different capacities.** To estop a party by judgment, he must have appeared in the former suit in the same right or capacity as that in which he appears in the later action. If he sues or is sued in a different character or interest, the judgment is not conclusive on him.<sup>64</sup>

(h) **Evidence of identity.** Parol evidence is admissible to identify the parties to the two suits.<sup>65</sup> The real party in interest may be connected with the record by extrinsic evidence.<sup>66</sup> Identity of the names of the parties to the two actions is prima facie evidence of identity of person.<sup>67</sup> If a discrepancy as to names exists, it may be removed by parol.<sup>68</sup>

(i) **Privies.** Not only the parties to a judgment, but those

<sup>64</sup> *Leggott v. G. N. R. Co.*, 1 Q. B. Div. 599; *Stoops v. Woods*, 45 Cal. 439; *Beals v. Cone*, 27 Colo. 473, 83 A. S. R. 92; *Fuller v. Metropolitan L. Ins. Co.*, 68 Conn. 55, 57 A. S. R. 84; *Erwin v. Garner*, 108 Ind. 488, 491; *Benz v. Hines*, 3 Kan. 390, 397; *Huyghe v. Brinkman*, 34 La. Ann. 1179; *Morrison v. Clark*, 89 Me. 103, 56 A. S. R. 395; *Bamka v. Chicago, St. P., M. & O. R. Co.*, 61 Minn. 549, 52 A. S. R. 618; *State v. Branch*, 134 Mo. 592, 56 A. S. R. 533; *First Nat. Bank v. Shuler*, 153 N. Y. 163, 60 A. S. R. 601; *Landon v. Townshend*, 112 N. Y. 93, 8 A. S. R. 712; *Nickum v. Burckhardt*, 30 Or. 464, 60 A. S. R. 822; *Sonnenberg v. Steinbach*, 9 S. D. 518, 62 A. S. R. 885; *Grigsby v. Peak*, 68 Tex. 235, 2 A. S. R. 487, 489; *McNutt v. Trogden*, 29 W. Va. 469. See, however, *Corcoran v. Chesapeake & O. Canal Co.*, 94 U. S. 741; *Colton v. Onderdonk*, 69 Cal. 155; *Stewart v. Montgomery*, 23 Pa. 410; *Manigault v. Holmes*, 2 Bailey Eq. (S. C.) 283.

One who appears in one action as a judgment creditor may be estopped by the judgment therein in a subsequent action in which he appears as a sheriff's indemnitor, since in neither action does he appear in a representative capacity. *Dyett v. Hyman*, 129 N. Y. 351, 26 A. S. R. 533.

<sup>65</sup> *Gray v. Gillilan*, 15 Ill. 453, 60 A. D. 761.

<sup>66</sup> *Claffin v. Fletcher*, 7 Fed. 851; *Tarleton v. Johnson*, 25 Ala. 300, 60 A. D. 515.

<sup>67</sup> *Garwood v. Garwood*, 29 Cal. 514. Presumption of identity, see § 48, *supra*.

<sup>68</sup> *Garwood v. Garwood*, 29 Cal. 514.

The question of identity of person, if it depends upon extrinsic evidence, is generally one for the jury. *Warner v. Mullane*, 23 Wis. 450.



in privity with them, are estopped by the adjudication.<sup>69</sup> "Privies are those who are so connected with the parties in estate, or in blood, or in law, as to be identified with them in interest, and consequently to be affected with them by the litigation, as lessor and lessee, heir and ancestor, executor and testator."<sup>70</sup> The privity that connects a person with a judgment to which he is not a party is privity of estate subsequently attaching. It is immaterial whether or not privity in blood or in law exists, except as it entitles a person to succeed to some right, title, or interest in the subject-matter of the litigation between others.<sup>71</sup> Unless the person who urges the judgment, or against whom the judgment is urged, claims an interest in the subject-matter of the adjudication through or under one of the parties,<sup>72</sup> and unless that interest was acquired after rendition of the judgment,<sup>73</sup> he is not estopped, nor may he take advantage of the estoppel.

<sup>69</sup> *Cunningham v. Harris*, 5 Cal. 81; *Carlton v. Davis*, 8 Allen (Mass.) 94; *Beebe v. Elliott*, 4 Barb. (N. Y.) 457; *Hodson v. Union Pac. R. Co.*, 14 Utah, 402, 60 A. S. R. 902.

<sup>70</sup> *Brown v. Chaney*, 1 Kelly (Ga.) 410, 412. And see *Ahlers v. Thomas*, 24 Nev. 407, 77 A. S. R. 820.

<sup>71</sup> *Black, Judgm.* § 549.

<sup>72</sup> *Orthwein v. Thomas*, 127 Ill. 554, 11 A. S. R. 159; *Belknap v. Stewart*, 38 Neb. 304, 308, 41 A. S. R. 729, 731; *Hunt v. Haven*, 52 N. H. 162; *Hart v. Moulton*, 104 Wis. 349, 76 A. S. R. 881. And see *Winston v. Westfeldt*, 22 Ala. 760, 58 A. D. 278.

To estop a party by judgment, the subject-matter of the two suits need not always be the same. But to estop one as a privy, identity of the subject-matter of the two suits is ordinarily essential. See *Hart v. Moulton*, 104 Wis. 349, 76 A. S. R. 881.

<sup>73</sup> *Shay v. McNamara*, 54 Cal. 169; *Orthwein v. Thomas*, 127 Ill. 554, 11 A. S. R. 159; *Love v. Francis*, 63 Mich. 181, 6 A. S. R. 290; *Hunt v. Haven*, 52 N. H. 162; *Campbell v. Hall*, 16 N. Y. 575; *Blackmore v. Gregg*, 10 Watts (Pa.) 222, 36 A. D. 171; *Zeigler v. Maner*, 53 S. C. 115, 69 A. S. R. 842; *Patterson v. Rabb*, 38 S. C. 138, 19 L. R. A. 831; *Bensimer v. Fell*, 35 W. Va. 15, 29 A. S. R. 774, 782; *Hart v. Moulton*, 104 Wis. 349, 76 A. S. R. 881. And see *Boutwell*

— **Illustrations of privity.** One who claims an after-acquired interest in the subject-matter of the prior suit through or under a party to it is a privy, and so estopped by the judgment.<sup>74</sup>

Husband and wife,<sup>75</sup> parent and child,<sup>76</sup> or guardian and ward,<sup>77</sup> as such, are not in privity.

Ancestor and heir are in privity.<sup>78</sup> Personal representative and heir or devisee are not in privity,<sup>79</sup> except as to the per-

v. Steiner, 84 Ala. 307, 5 A. S. R. 375; Warnock v. Harlow, 96 Cal. 298, 31 A. S. R. 209.

However, one who buys property pending a suit of which it forms the subject-matter is bound by the judgment subsequently rendered. Howard v. Kennedy's Ex'rs, 4 Ala. 592, 39 A. D. 307; Randall v. Lower, 98 Ind. 255; Craig v. Ward, 1 Abb. Dec. (N. Y.) 454; Diamond v. Lawrence County, 37 Pa. 353, 78 A. D. 429. The rule does not apply where the subject-matter of the suit is a negotiable instrument. Black, Judgm. § 550; Winston v. Westfeldt, 22 Ala. 760, 58 A. D. 278. And in some states the statute requires a notice of lis pendens to be filed, where the action concerns real property. Black, Judgm. § 550.

<sup>74</sup> Cook v. Parham, 63 Ala. 456; Cushing v. Edwards, 68 Iowa, 145; Whitford v. Crooks, 54 Mich. 261; Stoutimore v. Clark, 70 Mo. 471; Sheridan v. Andrews, 49 N. Y. 478; Strayer v. Johnson, 110 Pa. 21; Eakin v. McCraith, 2 Wash. T. 112; Finney v. Boyd, 26 Wis. 366. And see Woods v. Montevallo C. & T. Co., 84 Ala. 560, 5 A. S. R. 393; Ahlers v. Thomas, 24 Nev. 407, 77 A. S. R. 820.

<sup>75</sup> Groth v. Washburn, 39 Hun (N. Y.) 324; Neeson v. Troy, 29 Hun (N. Y.) 173; Walker v. Phila., 195 Pa. 168, 78 A. S. R. 801; Read v. Allen, 56 Tex. 182; Selleck v. Janesville, 104 Wis. 570, 76 A. S. R. 892.

<sup>76</sup> Bridger v. Asheville & S. R. Co., 27 S. C. 456, 13 A. S. R. 653; Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643.

<sup>77</sup> Morris v. Garrison, 27 Pa. 226.

<sup>78</sup> Webster v. Mann, 56 Tex. 119.

They are not in privity as to rights vesting in the heirs as such before the judgment is rendered. Love v. Francis, 63 Mich. 181, 6 A. S. R. 290.

<sup>79</sup> Boykin v. Cook, 61 Ala. 472; Beckett v. Selover, 7 Cal. 215, 68 A. D. 237; Stone v. Wood, 16 Ill. 177; Dorr v. Stockdale, 19 Iowa, 269; Valsain v. Cloutier, 3 La. 170, 22 A. D. 179; Gaither v. Welch's Estate, 3 Gill & J. (Md.) 259; Nichols v. Day, 32 N. H. 133, 64 A. D.

sonal estate.<sup>80</sup> Successive administrators of the same estate are not in privity;<sup>81</sup> nor are an executor and a succeeding administrator d. b. n.;<sup>82</sup> nor domestic and foreign executors or administrators of the same estate.<sup>83</sup> Administrator and purchaser at probate sale are not in privity;<sup>84</sup> nor is a personal representative of a deceased partner in privity with the survivors.<sup>85</sup> There is no privity between coheirs or distributees.<sup>86</sup>

Successors in public office are in privity;<sup>87</sup> and the same is true of successive receivers.<sup>88</sup>

A judgment against the principal does not ordinarily estop

358, 360; *Sharpe v. Freeman*, 45 N. Y. 802; *Osgood v. Manhattan Co.*, 3 Cow. (N. Y.) 612, 15 A. D. 304; *Wilson v. Kelly*, 19 S. C. 160; *Bensimer v. Fell*, 35 W. Va. 15, 29 A. S. R. 774, 780. *Contra*, *Cunningham v. Ashley*, 45 Cal. 485; *Moody v. Peyton*, 135 Mo. 482, 58 A. S. R. 604; *Faran v. Robinson*, 17 Ohio St. 242, 93 A. D. 617; *Barclay v. Kimsey*, 72 Ga. 725; *Shannon v. Taylor*, 16 Tex. 413.

A judgment for or against the heirs may estop the personal representative when subsequently suing for the benefit of the heirs, however. *Hardaway v. Drummond*, 27 Ga. 221, 73 A. D. 730.

<sup>80</sup> *Steele v. Lineberger*, 59 Pa. 308.

Executor and legatee of personalty are in privity until the legacy is paid. *Castellaw v. Guilmartin*, 54 Ga. 299; *Hooper v. Hooper*, 32 W. Va. 526. *Contra*, *Valsain v. Cloutier*, 3 La. 170, 22 A. D. 179.

<sup>81</sup> *Martin v. Ellerbe's Adm'r*, 70 Ala. 326.

<sup>82</sup> *Graves' Adm'r v. Flowers*, 51 Ala. 402, 23 A. R. 555; *Alsop v. Mather*, 8 Conn. 584, 21 A. D. 703. *Contra*, *Latine v. Clements*, 3 Kelly (Ga.) 426; *Manigault v. Holmes*, Bailey Eq. (S. C.) 283.

<sup>83</sup> *McLean v. Meek*, 18 How. (U. S.) 16; *Rosenthal v. Renick*, 44 Ill. 202; *Low v. Bartlett*, 8 Allen (Mass.) 259; *Pond v. Makepeace*, 2 Metc. (Mass.) 114; *Taylor v. Barron*, 35 N. H. 484; *Brodie v. Bickley*, 2 Rawle (Pa.) 431; *Jones v. Jones' Heirs*, 15 Tex. 463, 65 A. D. 174.

<sup>84</sup> *Crandall v. Gallup*, 12 Conn. 365.

<sup>85</sup> *Sturges v. Beach*, 1 Conn. 507; *Buckingham v. Ludlum*, 37 N. J. Eq. 137; *Leake & W. O. House v. Lawrence*, 11 Paige (N. Y.) 80; *Moore's Appeals*, 34 Pa. 411 (semble).

<sup>86</sup> *Walker v. Perryman*, 23 Ga. 309.

<sup>87</sup> *Brounker v. Atkyns*, Skin. 15.

<sup>88</sup> *Verplanck v. Van Buren*, 76 N. Y. 247.

the surety.<sup>89</sup> The rule is otherwise, however, as to sureties on a bond given in the course of the litigation in which the judgment is rendered.<sup>90</sup> And it has been held that there is privity between principal and surety on the bonds of sheriffs and constables,<sup>91</sup> executors and administrators,<sup>92</sup> and guardians.<sup>93</sup>

<sup>89</sup> *King v. Norman*, 4 C. B. 884; *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147; *Irwin v. Backus*, 25 Cal. 214, 85 A. D. 125; *Curry v. Mack*, 90 Ill. 606; *McConnell v. Poor*, 113 Iowa, 133, 52 L. R. A. 312; *Moss v. McCullough*, 5 Hill (N. Y.) 131; *Respublica v. Davis*, 3 Yeates (Pa.) 128, 2 A. D. 366. *Contra*, *Brush v. Wilson*, 2 L. C. 249.

<sup>90</sup> *Riddle v. Baker*, 13 Cal. 295; *Harvey v. Head*, 68 Ga. 247; *Keane v. Fisher*, 10 La. Ann. 261; *Way v. Lewis*, 115 Mass. 26; *Towle v. Towle*, 46 N. H. 431; *Methodist Churches v. Barker*, 18 N. Y. 463; *Parkhurst v. Sumner*, 23 Vt. 538, 56 A. D. 94. And see *Meyer v. Barth*, 97 Wis. 352, 65 A. S. R. 124.

<sup>91</sup> *Dennie v. Smith*, 129 Mass. 143; *Evans v. Com.*, 8 Watts (Pa.) 398, 34 A. D. 477; *Tute v. James*, 50 Vt. 124. *Contra*, *Lucas v. Governor*, 6 Ala. 826; *Pico v. Webster*, 14 Cal. 202, 73 A. D. 647; *Governor v. Shelby*, 2 Blackf. (Ind.) 26; *Carmichael v. Governor*, 3 How. (Miss.) 236; *Rodini v. Lytle*, 17 Mont. 448, 52 L. R. A. 165.

Whether the sureties on a bond given by a deputy sheriff to his principal are estopped by a judgment against the sheriff based on the deputy's default depends on a construction of the instrument. *Thomas v. Hubbell*, 15 N. Y. 405, 69 A. D. 619; *Chamberlain v. Godfrey*, 36 Vt. 380, 84 A. D. 690.

Sureties may urge the estoppel created by a judgment in favor of the principal. *Brown v. Bradford*, 30 Ga. 927; *Lower Alloways Creek v. Moore*, 15 N. J. Law, 146.

<sup>92</sup> *Stovall v. Banks*, 10 Wall. (U. S.) 583; *Martin v. Tally*, 72 Ala. 23; *Irwin v. Backus*, 25 Cal. 214, 85 A. D. 125; *Ralston v. Wood*, 15 Ill. 159, 58 A. D. 604 (statute); *Salyer v. State*, 5 Ind. 202; *Heard v. Lodge*, 20 Pick. (Mass.) 53, 32 A. D. 197; *State v. Holt*, 27 Mo. 340, 72 A. D. 273; *Kenck v. Parchen*, 22 Mont. 519, 74 A. S. R. 625; *Judge of Probate v. Sulloway*, 68 N. H. 511, 49 L. R. A. 347; *Casoni v. Jerome*, 58 N. Y. 315; *Slagle v. Entrekinn*, 44 Ohio St. 637; *Garber v. Com.*, 7 Pa. 265. *Contra*, *Means v. Hicks' Adm'r*, 65 Ala. 241; *Bennett v. Graham*, 71 Ga. 211; *Hayes v. Seaver*, 7 Me. 237; *Lipscomb v. Postell*, 38 Miss. 476, 77 A. D. 651; *Chairman of Wash. Co. Ct. v. Harramond*, 11 N. C. (4 Hawks) 339; *Norton v. Wallace*, 1 Rich. Law (S. C.) 507; *Hobson v. Yancey*, 2 Grat. (Va.) 73.

## § 148. Questions concluded.

(a) **General rule.** Though the issues in the two suits may be such that the judgment in the former is not a bar to the right of action or defense asserted in the latter, yet the judgment precludes disproof of any matter which was determined in the former action.<sup>94</sup> Where a judgment is directly attacked, as by an action to set it aside, however, it has no conclusive effect,<sup>95</sup> unless the precise ground of nullity was raised

<sup>93</sup> *Halley v. Boyd's Adm'r*, 64 Ala. 399; *Brodrib v. Brodrib*, 56 Cal. 563; *McCleary v. Menke*, 109 Ill. 294; *McWilliams v. Kalbach*, 55 Iowa, 110; *Cross v. White*, 80 Minn. 413, 81 A. S. R. 267; *Braiden v. Mercer*, 44 Ohio St. 339; *Com. v. Rhoads*, 37 Pa. 60. *Contra*, *Fuseller v. Babineau*, 14 La. Ann. 764; *State v. Hull*, 53 Miss. 626; *Moore v. Alexander*, 96 N. C. 34 (statute).

<sup>94</sup> UNITED STATES: *Cromwell v. Sac County*, 94 U. S. 351.

ALABAMA: *Norwood v. Kirby's Adm'r*, 70 Ala. 397.

CONNECTICUT: *Huntley v. Holt*, 59 Conn. 102, 21 A. S. R. 71; *Coit v. Tracy*, 8 Conn. 268, 20 A. D. 110.

ILLINOIS: *Mueller v. Henning*, 102 Ill. 646.

IOWA: *Hawley v. Warner*, 12 Iowa, 42.

KENTUCKY: *Pleak v. Chambers*, 7 B. Mon. 565.

LOUISIANA: *Montesquieu v. Hell*, 4 La. 51, 23 A. D. 471.

MAINE: *Hobbs v. Parker*, 31 Me. 143.

MASSACHUSETTS: *Jennison v. West Springfield*, 13 Gray, 544.

MICHIGAN: *Castor v. Bates*, 127 Mich. 285, 89 A. S. R. 471.

MINNESOTA: *Byrne v. Minneapolis & St. L. R. Co.*, 38 Minn. 212, 8 A. S. R. 668.

MISSOURI: *State v. Branch*, 134 Mo. 592, 56 A. S. R. 532; *Paddock v. Somes*, 102 Mo. 226, 10 L. R. A. 254; *Weir v. Marley*, 99 Mo. 484, 6 L. R. A. 672.

NEW YORK: *Burhans v. Van Zandt*, 7 N. Y. 523; *Burt v. Sternburgh*, 4 Cow. 559, 15 A. D. 402.

NORTH CAROLINA: *Dixon v. Warters*, 53 N. C. (8 Jones) 449.

PENNSYLVANIA: *Allen v. International T. B. Co.*, 201 Pa. 579, 88 A. S. R. 834; *Rankin's Appeal*, 1 Monaghan, 308, 2 L. R. A. 429.

SOUTH CAROLINA: *Parker v. Leggett*, 13 Rich. Law, 171.

VERMONT: *Small v. Haskins*, 26 Vt. 209.

WISCONSIN: *State v. McDonald*, 108 Wis. 8, 81 A. S. R. 878. And see, generally, 7 Current Law, 1767.

<sup>95</sup> *Davidson v. New Orleans*, 32 La. Ann. 1245.

and decided in the action in which the judgment was rendered.<sup>96</sup>

(b) **Identity of cause of action.** The judgment works an estoppel as to matters thus determined, even though the cause of action or the subject-matter of the later suit is different from that involved in the earlier action.<sup>97</sup> It is commonly said that this rule furnishes a point of distinction between judgments set up as a bar and judgments offered as proof of rights or facts not entirely founding the right of action or defense in the second suit. When a judgment is put forward as a bar, it is said, the causes of action in the two suits must be the same.<sup>98</sup> This statement, however, is much too broad. In the first place, defenses, as well as rights of action, may be barred by former adjudication. A judgment against a particular defense may bar that defense in any subsequent action between the parties or their privies, whether or not the causes of action are identical. In the second place, it is too broad a statement even to say that to create a bar the causes of action or grounds of defense must be the same. The truth of the matter is that a judgment will bar any subsequent right of action or defense that rests entirely on the same right or

<sup>96</sup> *The Acorn*, 2 Abb. U. S. 434, Fed. Cas. No. 29; *Hoggatt's Heirs v. Crandall*, 39 La. Ann. 976.

<sup>97</sup> *Aslin v. Parkin*, 2 Burrow, 665, 668; *Cromwell v. Sac County*, 94 U. S. 351; *Jackson v. Lodge*, 36 Cal. 28; *Betts v. Starr*, 5 Conn. 550, 13 A. D. 94; *Markley v. People*, 171 Ill. 260, 63 A. S. R. 234; *Hanna v. Read*, 102 Ill. 596, 40 A. R. 608, 611; *Eastman v. Cooper*, 15 Pick. (Mass.) 276, 26 A. D. 600, 605; *Spencer v. Dearth*, 43 Vt. 98.

The fact that additional property was involved in the former action does not affect the conclusiveness of the judgment as to the property involved in the subsequent suit. *Rucker v. Steelman*, 97 Ind. 222. Nor does the fact that additional evidence is offered in the subsequent suit affect the conclusiveness of the judgment. *Du Bois v. Phila., W. & B. R. Co.*, 5 Fish. Pat. Cas. 208, Fed. Cas. No. 4,109.

<sup>98</sup> *Betts v. Starr*, 5 Conn. 550, 13 A. D. 94, 97 (semble); *Eastman v. Cooper*, 15 Pick. (Mass.) 276, 26 A. D. 600.

state of facts as that established by the judgment. The form of the action and the relief asked are not the criterion. The question is, does the subsequent action or defense rest entirely on the same right or state of facts as the former judgment? If so, the judgment is a bar.<sup>99</sup> Otherwise, it is not a bar, though it may be competent to establish the matter which it determines.

(c) **Identity of matter in dispute.** A judgment does not work an estoppel as to a particular matter in dispute unless that same matter was in dispute in the former action also.<sup>100</sup>

<sup>99</sup> A judgment may be a bar in any proceeding where the same right or title is asserted, even though the cause of action be different. *Watson v. Richardson*, 110 Iowa, 698, 80 A. S. R. 331; *Martin v. Evans*, 85 Md. 8, 60 A. S. R. 292; *Hall v. Zeller*, 17 Or. 381; *Jones v. Weathersbee*, 4 Stroh. (S. C.) 50, 51 A. D. 653; *Gallaher v. Moundsville*, 34 W. Va. 730, 26 A. S. R. 942. And see *Cavanaugh v. Buehler*, 120 Pa. 441, 457. And even though the subject-matter of the two suits be different. *Baxter v. Myers*, 85 Iowa, 328, 39 A. S. R. 298; *Hodge v. Shaw*, 85 Iowa, 137, 39 A. S. R. 290; *Furneaux v. First Nat. Bank*, 39 Kan. 144, 7 A. S. R. 541; *Young v. Brehe*, 19 Nev. 379, 3 A. S. R. 892; *Doty v. Brown*, 4 N. Y. 71, 53 A. D. 350. It is not the object of the suit or the recovery or fruits of litigation alone, that constitutes the bar, but the facts in issue and determined as the basis of the judgment. *Caperton v. Schmidt*, 26 Cal. 479, 85 A. D. 187, 193; *Barker v. Cleveland*, 19 Mich. 230; *Burt v. Sternburgh*, 4 Cow. (N. Y.) 559, 15 A. D. 402; *Harrison v. Wallton's Ex'r*, 95 Va. 721, 64 A. S. R. 830.

<sup>100</sup> UNITED STATES: *Cromwell v. Sac County*, 94 U. S. 351.

ALABAMA: *Aderholdt v. Henry*, 87 Ala. 415, 6 L. R. A. 451.

CONNECTICUT: *Fuller v. Metropolitan L. Ins. Co.*, 68 Conn. 55, 57 A. S. R. 84.

ILLINOIS: *Smith v. Smith*, 174 Ill. 52, 43 L. R. A. 403, 407.

INDIANA: *Kenney v. Phillipy*, 91 Ind. 511.

KENTUCKY: *Mattox v. Helm*, 5 Litt. 185, 15 A. D. 64; *Newson v. Lycan*, 3 J. J. Marsh. 440, 20 A. D. 156, 157.

LOUISIANA: *Durham v. Williams*, 32 La. Ann. 968.

MAINE: *Howard v. Kimball*, 65 Me. 308.

MARYLAND: *Hughes v. Jones*, 2 Md. Ch. 178.

MISSOURI: *Short v. Taylor*, 137 Mo. 517, 59 A. S. R. 508.

NEW YORK: *Palmer v. Hussey*, 87 N. Y. 303.

If, for example, the facts on which the judgment rests have changed since its rendition, as where the case is ambulatory in its nature, and has ceased to be the same by progression, or if, to take another example, new rights have been acquired since the judgment was rendered, it is not conclusive of those facts or rights in a subsequent suit.<sup>101</sup>

(d) **Incidental and collateral matters.** Generally speaking, the judgment is conclusive only of those facts on which it rests, and without which it could not have been rendered.<sup>102</sup> It has been held, however, that where a question was presented by the pleadings, argued by counsel, and decided by the court, the question becomes *res judicata*, even though a determination of it was not strictly necessary to a determination of the suit.<sup>103</sup>

The judgment does not work an estoppel as to a matter unless that matter was directly in issue in the former action. Incidental or collateral questions, though raised and determined, are not concluded.<sup>104</sup> "Any fact attempted to be es-

NORTH CAROLINA: *Doe d. Stokes v. Fraley*, 50 N. C. (5 Jones) 377.

TENNESSEE: *Casey v. McFalls*, 3 Sneed, 114.

VERMONT: *Jericho v. Underhill*, 67 Vt. 85, 48 A. S. R. 804; *Manley's Ex'r v. Staples*, 62 Vt. 153, 8 L. R. A. 707.

<sup>101</sup> *State v. Williams*, 131 Ala. 56, 90 A. S. R. 17; *Ashford v. Prewitt*, 102 Ala. 264, 48 A. S. R. 37; *Erwin v. Garner*, 108 Ind. 488; *Everitt v. Everitt*, 29 Ind. App. 508, 94 A. S. R. 276; *Brown v. Roberts*, 24 N. H. 131; *Burt v. Sternburgh*, 4 Cow. (N. Y.) 559, 15 A. D. 402; *Dewey v. St. Albans T. Co.*, 60 Vt. 1, 6 A. S. R. 84.

<sup>102</sup> *Watts v. Rice*, 75 Ala. 289; *Phelan v. Gardner*, 43 Cal. 306; *Hunter v. Davis*, 19 Ga. 413; *Walte v. Teeters*, 36 Kan. 604; *Burlen v. Shannon*, 99 Mass. 200, 96 A. D. 733; *Belknap v. Stewart*, 38 Neb. 304, 41 A. S. R. 729; *People v. Johnson*, 38 N. Y. 63, 97 A. D. 770; *Lentz v. Wallace*, 17 Pa. 412, 55 A. D. 569; *Church v. Chapin*, 35 Vt. 223; *Bergeron v. Richardott*, 55 Wis. 129.

<sup>103</sup> *Almy v. Daniels*, 15 R. I. 312.

<sup>104</sup> *Rex v. Duchess of Kingston*, 20 How. State Tr. 538, 2 Smith's Lead. Cas. (11th Ed.) 731; *Hopkins v. Lee*, 6 Wheat. (U. S.) 109; *Shall v. Biscoe*, 18 Ark. 142; *Wahle v. Wahle*, 71 Ill. 510; *Land v. Keirn*, 52 Miss.



tablished by evidence and controverted by the adverse party may be said to be in issue in one sense. As, for instance, in an action of trespass, if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff's evidence would show him to have been at a certain time, it may be said that this controverted fact is a matter in issue between the parties. This may be tried, and may be the only matter put in controversy by the evidence of the parties. But this is not the matter in issue, within the meaning of the rule [of *res judicata*]. It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, which is in issue. \* \* \* Facts offered in evidence to establish the matters in issue are not themselves in issue, within the meaning of the rule, although they may be controverted on the trial."<sup>105</sup>

While the fact must have been directly in issue, yet, by the better opinion, it need not have been specifically put in issue by the pleadings.<sup>106</sup> If the pleadings do not show it specifically, extrinsic evidence is admissible to show what was in issue, and thereby to make the pleadings as if they were special.<sup>107</sup>

(e) **Necessity of actual determination.** It is commonly said that when a former judgment is set up as a bar to the whole controversy, it is immaterial that the particular claim asserted

341; *Fish v. Lightner*, 44 Mo. 268; *Lawrence v. Hunt*, 10 Wend. (N. Y.) 80, 25 A. D. 539; *Wood v. Jackson*, 8 Wend. (N. Y.) 9, 22 A. D. 603; *Cavanaugh v. Buehler*, 120 Pa. 441; *Henry v. Davis*, 13 W. Va. 230; *Williams v. Williams*, 63 Wis. 58, 53 A. R. 253.

<sup>105</sup> *King v. Chase*, 15 N. H. 9, 41 A. D. 675, 678. *Contra*, *Wood v. Jackson*, 8 Wend. (N. Y.) 9, 22 A. D. 603, 620.

<sup>106</sup> *Trayhern v. Colburn*, 66 Md. 277; *Eastman v. Cooper*, 15 Pick. (Mass.) 276, 26 A. D. 600, 604; *King v. Chase*, 15 N. H. 9, 41 A. D. 675, 678, 681. And see *Babcock v. Camp*, 12 Ohio St. 11. *Contra*, *Fuller v. Metropolitan L. Ins. Co.*, 68 Conn. 55, 57 A. S. R. 84, 89 (semble); *Stapleton v. Dee*, 132 Mass. 279, 282.

<sup>107</sup> See § 148(f), *infra*.

in the later suit was not determined in the former action, provided that that claim might have been presented there as a ground of recovery or defense;<sup>108</sup> but that when the judgment is offered, not as a bar, but only as establishing a particular right or fact not in itself constituting a ground of action or defense in the later action, there must have been an actual determination of that right or fact in the former suit; that it is not sufficient to work an estoppel under these circumstances that the right or fact might properly have been raised and decided in the former suit, but that it must in fact have been determined there.<sup>109</sup> This statement is true so far as it concerns the judgment as a bar, but otherwise it is only partially true.

If the right or fact actually determined by a judgment comes in question in a subsequent suit, the parties are precluded from asserting anything against that right or fact which might properly have been advanced against it in the prior suit, whether it was so advanced or not, and this is true, whether the judgment is offered as a bar or otherwise. In this event it is sufficient to create an estoppel against the derogatory matter that the right or fact in issue in the later suit was actually determined in the former action, even though, because of different issues, the later suit is not barred by the judgment.<sup>110</sup> Suppose, for instance, that a judgment estab-

<sup>108</sup> *Cromwell v. Sac County*, 94 U. S. 351; *Columb v. Webster Mfg. Co.*, 50 U. S. App. 264, 84 Fed. 592, 43 L. R. A. 195; *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 5 A. S. R. 502; *Hanna v. Read*, 102 Ill. 596, 40 A. R. 608, 611; *O'Brien v. Manwaring*, 79 Minn. 86, 79 A. S. R. 426; *White v. Ladd*, 41 Or. 324, 93 A. S. R. 732.

<sup>109</sup> *Cromwell v. Sac County*, 94 U. S. 351; *Freeman v. Barnum*, 131 Cal. 386, 82 A. S. R. 355; *Brady v. Pryor*, 69 Ga. 691; *Adams v. Yazoo & M. V. R. Co.*, 77 Miss. 194, 60 L. R. A. 33, 84; *Applegate v. Dowell*, 15 Or. 513; *Pitts v. Oliver*, 13 S. D. 561, 79 A. S. R. 907. See *Sloan v. Price*, 84 Ga. 171.

<sup>110</sup> *Marion County Com'rs v. Welch*, 40 Kan. 767.

lishes a title in the defendant, and that in a subsequent suit by the plaintiff against the defendant the title comes in question, not as founding the cause of action, but only incidentally. In this case the judgment cannot operate as a bar because the entire controversy was not in issue in the former suit, but the defendant may, of course, offer the judgment in evidence as establishing his title. In this event the judgment establishes that title, and estops the plaintiff from setting up against it anything which he might have urged against it in the former action. To this extent, therefore, it is wrong to say that a judgment not operating as a bar does not work an estoppel as to a particular matter unless that matter was actually determined in the former suit. That statement, as will next appear, applies only to cases where the right or fact actually determined by the judgment is not in issue in the subsequent suit.

If a right or fact is actually determined by a judgment, and, in a later suit not barred by the judgment, the parties take issue, not on that right or fact, but on some matter which might properly have been advanced against it in the prior suit, then in this event there must have been an actual determination of the derogatory matter, unless a determination of it was necessarily involved in the decision.<sup>111</sup> In this case it is not sufficient to create an estoppel against the derogatory matter that it might properly have been litigated and decided in the former action. It must actually have been determined there. To this extent, therefore, and to this extent only, it is correct to say that a judgment not operating as a bar does not work an estoppel as to a particular matter unless that matter was actually determined in the former suit.

Subject to the foregoing discussion, and an apparent qualification to be noticed, it may be announced as a general rule

<sup>111</sup> See page 511, *infra*.

that a judgment does not work an estoppel except as to matters actually litigated and decided.<sup>112</sup> So, if it affirmatively appears that a matter in question in a later suit was not determined by the judgment, it creates no estoppel.<sup>113</sup> And if, from the nature of the case, the form of the action, or the character of the pleadings, a given question could not properly have been decided in the former action, the judgment therein is not conclusive of that question.<sup>114</sup>

An apparent qualification of the rule requiring an actual decision is that matters necessarily adjudicated in arriving at the decision are concluded by the judgment. Where an indisputable conclusion could have been drawn only from certain premises, the premises are equally indisputable with the conclusion.<sup>115</sup> If the determination of a matter can be gathered from the judgment only by argument or inference or construction, however, an estoppel does not arise as to that matter.<sup>116</sup>

<sup>112</sup> *Eastman v. Cooper*, 15 Pick. (Mass.) 276, 26 A. D. 600, 605; *Sherman v. Dilley*, 3 Nev. 21; *Malloney v. Horan*, 49 N. Y. 111, 10 A. R. 335; *Campbell v. Consalus*, 25 N. Y. 613; *Sweet v. Tuttle*, 14 N. Y. 465; *Mason v. Alston*, 9 N. Y. 28, 59 A. D. 515; *Howe v. First Nat. Bank (Pa.)* 1 Atl. 787; *Hunter v. Hunter*, 63 S. C. 78, 90 A. S. R. 663.

<sup>113</sup> *Bentley v. O'Bryan*, 111 Ill. 53; *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 164 Mass. 222, 49 A. S. R. 454; *Smoot v. Judd*, 161 Mo. 673, 84 A. S. R. 738.

<sup>114</sup> *Gordon v. Kennedy*, 36 Iowa, 167; *Petrie v. Badenoch*, 102 Mich. 45, 47 A. S. R. 503; *Hymes v. Estey*, 116 N. Y. 501, 15 A. S. R. 421; *Embury v. Conner*, 3 N. Y. 511, 53 A. D. 325; *Adams v. Church*, 42 Or. 270, 59 L. R. A. 782; *Bensimar v. Fell*, 35 W. Va. 15, 29 A. S. R. 774, 779.

<sup>115</sup> *Chamberlain v. Gaillard*, 26 Ala. 504; *Hayes v. Shattuck*, 21 Cal. 51; *Sly v. Hunt*, 159 Mass. 151, 38 A. S. R. 403; *Burlen v. Shannon*, 99 Mass. 200, 96 A. D. 733, 736; *Cutter v. Butler*, 25 N. H. 343, 57 A. D. 330.

<sup>116</sup> *Rex v. Duchess of Kingston*, 20 How. State Tr. 538, 2 Smith's Lead. Cas. (11th Ed.) 731; *Hopkins v. Lee*, 6 Wheat. (U. S.) 109; *McCravey v. Remson*, 19 Ala. 430, 54 A. D. 194; *Shall v. Biscoe*, 18 Ark. 142; *Dickinson v. Hayes*, 31 Conn. 417; *Wahle v. Wahle*, 71 Ill. 510;

(f) **Evidence of identity.** It is not necessary that the record in the former action should show that the fact in question was determined there. If the form of the action and the pleadings are such that the fact in question might properly have been decided in the former suit, the determination of it in fact may be shown by evidence aliunde. Extrinsic evidence is competent to identify the issues in the two suits.<sup>117</sup> Extrinsic evidence is admissible, also, to show that the fact in question, though it might have been, was not in truth, determined, and that the judgment was rested on another ground.<sup>118</sup>

**LAWRENCE v. HUNT**, 10 Wend. (N. Y.) 80, 25 A. D. 539; **BENNETT v. HOLMES**, 18 N. C. (1 Dev. & B.) 486.

<sup>117</sup> **UNITED STATES**: **Wilson's Ex'r v. Deen**, 121 U. S. 525.

**ALABAMA**: **Chamberlain v. Gaillard**, 26 Ala. 504.

**CONNECTICUT**: **Supples v. Cannon**, 44 Conn. 424.

**ILLINOIS**: **Gray v. Gillilan**, 15 Ill. 453, 60 A. D. 761.

**IOWA**: **State v. Meek**, 112 Iowa, 338, 51 L. R. A. 414.

**MAINE**: **Lander v. Arno**, 65 Me. 28.

**MARYLAND**: **Hughes v. Jones**, 2 Md. Ch. 178.

**MASSACHUSETTS**: **Sawyer v. Woodbury**, 7 Gray, 499, 66 A. D. 518;

**EASTMAN v. COOPER**, 15 Pick. 276, 26 A. D. 600, 605.

**MISSOURI**: **Short v. Taylor**, 137 Mo. 517, 59 A. S. R. 508.

**NEBRASKA**: **Slater v. Skirving**, 51 Neb. 108, 66 A. S. R. 444.

**NEVADA**: **Sherman v. Dilley**, 3 Nev. 21.

**NEW HAMPSHIRE**: **King v. Chase**, 15 N. H. 9, 41 A. D. 675.

**NEW YORK**: **Lawrence v. Hunt**, 10 Wend. 80, 25 A. D. 539, 541; **Wood v. Jackson**, 8 Wend. 9, 22 A. D. 603, 620.

**NORTH DAKOTA**: **Fahey v. Esterley Mach. Co.**, 3 N. D. 220, 44 A. S. R. 554.

**TEXAS**: **Oldham v. McIver**, 49 Tex. 556, 572; **Foster v. Wells**, 4 Tex. 101.

**VERMONT**: **Perkins v. Walker**, 19 Vt. 144.

**WISCONSIN**: **Driscoll v. Damp**, 16 Wis. 106.

*Contra*, **Sintzenick v. Lucas**, 1 Esp. 43; **Smith v. Sherwood**, 4 Conn. 276, 10 A. D. 143.

<sup>118</sup> **Bottorff v. Wise**, 53 Ind. 32; **Cunningham v. Foster**, 49 Me. 68; **Bridge v. Gray**, 14 Pick. (Mass.) 55, 25 A. D. 358; **Dunlap v. Edwards**, 29 Miss. 41; **Sweet v. Maupin**, 65 Mo. 65; **Phillips v. Berick**, 16 Johns.

Extrinsic evidence is thus admissible, however, only where it is consistent with the record. It is competent only to dispel obscurity or ambiguity in the record, or to supply its omissions and make specific what is expressed in it in general terms. Extrinsic evidence is not competent to contradict or to vary the record.<sup>119</sup> Thus, parol evidence is not admissible to extend the scope of the estoppel beyond the limits of those questions which, in view of the form of the action or the pleadings, might have been raised and determined in the former suit.<sup>120</sup> Nor is it admissible to limit the scope of the estoppel by showing that questions which the record shows to have been in issue were not in truth passed upon.<sup>121</sup>

**(g) Burden of proof.** If the record does not show on its face that the fact in question was determined by the judgment, the party urging the estoppel carries the burden of proving the determination of it.<sup>122</sup>

**(h) Province of court and of jury.** If the question of the identity of the issues in the two suits depends upon a construction of the record alone, it is one for the court;<sup>123</sup> but

(N. Y.) 136, 8 A. D. 299; *Davis v. Talcott*, 14 Barb. (N. Y.) 611; *Follansbee v. Walker*, 74 Pa. 306; *Parks v. Moore*, 13 Vt. 183, 37 A. D. 589.

<sup>119</sup> *Bailey v. Dilworth*, 10 Smedes & M. (Miss.) 404, 48 A. D. 760; *Slater v. Skirving*, 51 Neb. 108, 66 A. S. R. 444.

<sup>120</sup> *Meredith v. Santa Clara Min. Ass'n*, 56 Cal. 178; *Jones v. Perkins*, 54 Me. 393; *Campbell v. Butts*, 3 N. Y. 173; *Manny v. Harris*, 2 Johns. (N. Y.) 24, 3 A. D. 386, 389.

<sup>121</sup> *Underwood v. French*, 6 Or. 66, 25 A. R. 500; *Freeman v. McAninch*, 87 Tex. 132, 47 A. S. R. 79.

<sup>122</sup> *Russell v. Place*, 94 U. S. 606; *Hanchey v. Coskrey*, 81 Ala. 149, 151; *Lea v. Lea*, 99 Mass. 493, 96 A. D. 772; *Sawyer v. Woodbury*, 7 Gray (Mass.) 499, 66 A. D. 518; *Slater v. Skirving*, 51 Neb. 108, 66 A. S. R. 444; *Lawrence v. Hunt*, 10 Wend. (N. Y.) 80, 25 A. D. 539, 542; *Chrisman's Adm'x v. Harman*, 29 Grat. (Va.) 494. See, however, *Hollis v. Morris*, 2 Har. (Del.) 128; *White v. Simonds*, 33 Vt. 178, 78 A. D. 620.

<sup>123</sup> *Young v. Byrd*, 124 Mo. 590, 46 A. S. R. 461; *Ehle v. Bingham*, 7

*Hammon, Ev.—33.*

if it depends upon extrinsic evidence, it is generally a question for the jury.<sup>124</sup>

### ART. III. ESTOPPEL BY DEED.

General considerations, § 149.

Estoppel as to pre-existing title, § 150.

- (a) Grantor.
- (b) Grantee.

Estoppel as to after-acquired title, § 151.

- (a) General rule.
- (b) Necessity and effect of covenants for title.
- (c) Estoppel as conveyance of title.

Estoppel as to facts recited, § 152.

- (a) Recitals binding grantee.
- (b) Recitals of conclusions of law.
- (c) Certainty—General and particular recitals.
- (d) Materiality—Collateral matters.

Persons estopped and entitled to urge estoppel, § 153.

- (a) Parties to deed.
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- (c) Strangers to deed—Mutuality of estoppel.

Execution, validity, and construction of deed, § 154.

- (a) Execution, delivery, and acceptance.
- (b) Modification.
- (c) Validity.
- (d) Construction—Truth appearing on face of deed.

Estoppel against estoppel, § 155.

#### § 149. General considerations.

Estoppel by deed is a bar which precludes a party from asserting a right or title, whether pre-existing or after-acquired, in derogation of the instrument, or from denying any matter of fact recited in the deed. This form of estoppel, like all others, is based on rules of substantive law which rest

Barb. (N. Y.) 494; *Finley v. Hanbest*, 30 Pa. 190; *Coulter v. Davis*, 13 Lea (Tenn.) 451.

<sup>124</sup> *Amsden v. Dubuque & S. C. R. Co.*, 32 Iowa, 288; *Whitehurst v. Rogers*, 38 Md. 503; *Rockwell v. Langley*, 19 Pa. 502.

on reasons of justice or policy. Properly speaking, it does not relate to the law of evidence. Like the so-called conclusive presumptions of law, it rests on rules of substantive law which declare the legal insignificance of the right, title, or fact sought to be asserted in opposition to the terms of the deed.<sup>125</sup>

**§ 150. Estoppel as to pre-existing title.**

(a) **Grantor.** A grantor is estopped to assert any pre-existing right or title in derogation of his deed.<sup>126</sup> This is undoubtedly true if the deed contains covenants for title,<sup>127</sup> but technical covenants for title are not indispensable to create the estoppel. If the deed bears on its face evidence that the grantor intended to convey, and that the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain proceeded upon that footing, the deed creates an estoppel, although it contains no covenants for title.<sup>128</sup>

(b) **Grantee.** Subject to several exceptions, neither a grantee nor one claiming under him is estopped to deny the gran-

<sup>125</sup> *Mutual Life Ins. Co. v. Corey*, 135 N. Y. 326.

<sup>126</sup> *Dodge v. Walley*, 22 Cal. 224, 83 A. D. 61; *Morris v. Wheat*, 8 App. D. C. 379; *Turner v. Thompson*, 58 Ga. 268, 24 A. R. 497; *Needham v. Clary*, 62 Ill. 344; *Durham v. Alden*, 20 Me. 228, 37 A. D. 48; *Thompson v. Thompson*, 19 Me. 235, 36 A. D. 751; *Comstock v. Smith*, 13 Pick. (Mass.) 116, 23 A. D. 670; *De Rochemont v. B. & M. R.*, 64 N. H. 500; *Jackson v. Demont*, 9 Johns. (N. Y.) 55, 6 A. D. 259; *Rogers v. Cawood*, 1 Swan (Tenn.) 142, 55 A. D. 729; *Richardson v. Powell*, 83 Tex. 588; 7 Current Law, 1489.

This applies to mortgagors. *Sutline v. Jones*, 61 Ga. 676; *Hoppin v. Hoppin*, 96 Ill. 265; *Nash v. Spofford*, 10 Metc. (Mass.) 192, 43 A. D. 425; *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 A. D. 688; *Cuthrell v. Hawkins*, 98 N. C. 203. And it applies to mortgagors of personalty, as well as of realty. *Harvey v. Harvey*, 13 R. I. 598.

<sup>127</sup> *McManness v. Paxson*, 37 Fed. 296; *Drake v. Root*, 2 Colo. 685; *Cross v. Robinson*, 21 Conn. 379.

<sup>128</sup> *Wells v. Steckelberg*, 52 Neb. 597, 66 A. S. R. 529; *Bayley v. McCoy*, 8 Or. 259.



tor's title.<sup>129</sup> He may, for example, claim a paramount title under a conveyance from another grantor.<sup>130</sup> However, one who accepts a deed with covenants of seisin is estopped to assert that he himself was seised at the time of the conveyance,<sup>131</sup> and under some circumstances the grantee may be estopped by recitals in the deed from disputing his grantor's title.<sup>132</sup>

**§ 151. Estoppel as to after-acquired title.**

(a) **General rule.** An estate by estoppel arises, generally speaking, in cases where a person without title makes a conveyance of land by deed with warranty, and subsequently, by descent or by purchase, acquires the ownership. This after-acquired title of the grantor "inures," it is usual to say, by estoppel to the benefit of the grantee.<sup>133</sup> The doctrine of title

<sup>129</sup> *Grosholz v. Newman*, 21 Wall. (U. S.) 481; *Cannon v. Stockmon*, 36 Cal. 535, 95 A. D. 205; *Kansas Pac. R. Co. v. Dunmeyer*, 24 Kan. 725; *Winlock v. Hardy*, 4 Litt. (Ky.) 272; *Macklot v. Dubreuil*, 9 Mo. 473, 43 A. D. 550; *Osterhout v. Shoemaker*, 3 Hill (N. Y.) 513; 7 Current Law, 1489.

A grantee is not in privity with his grantor, so as to be bound by an estoppel against the latter. Section 153(b), *infra*.

<sup>130</sup> *Blight's Lessee v. Rochester*, 7 Wheat. (U. S.) 535; *Casey's Lessee v. Inloes*, 1 Gill (Md.) 430, 39 A. D. 658; *Cummings v. Powell*, 97 Mo. 524, 536.

<sup>131</sup> *Furness v. Williams*, 11 Ill. 229; *Fitch v. Baldwin*, 17 Johns. (N. Y.) 161. See, however, *Thompson v. Thompson*, 19 Me. 235, 36 A. D. 751.

<sup>132</sup> Section 152(a), *infra*.

<sup>133</sup> *Bigelow, Estop.* (5th Ed.) 384.

CANADA: *Robertson v. Daley*, 11 Ont. 352.

UNITED STATES: *Jenkins v. Collard*, 145 U. S. 546; *Irvine v. Irvine*, 9 Wall. 617.

ALABAMA: *Kennedy v. McCartney's Heirs*, 4 Port. 141.

CALIFORNIA: *De Frieze v. Quint*, 94 Cal. 653, 28 A. S. R. 151; *Klumpke v. Baker*, 68 Cal. 559.

DELAWARE: *Doe d. Potts v. Dowdall*, 3 Houst. 369, 11 A. R. 757.

GEORGIA: *Terry v. Rodahan*, 79 Ga. 278, 11 A. S. R. 420 (statute); *Doe d. O'Bannon v. Paremour*, 24 Ga. 489.

by estoppel has been held applicable to personal property

ILLINOIS: *Whitson v. Grosvenor*, 170 Ill. 271; *Wadhams v. Swan*, 109 Ill. 46; *Jones v. King*, 25 Ill. 383.

IOWA: *Nicodemus v. Young*, 90 Iowa, 423; *Childs v. McChesney*, 20 Iowa, 431, 89 A. D. 545.

KANSAS: *Scoffins v. Grandstaff*, 12 Kan. 467.

KENTUCKY: *Perkins v. Coleman*, 90 Ky. 611; *Fitzhugh's Heirs v. Tyler*, 9 B. Mon. 559; *Morrison v. Caldwell*, 5 T. B. Mon. 426, 17 A. D. 84.

MAINE: *Baxter v. Bradbury*, 20 Me. 260, 37 A. D. 49.

MASSACHUSETTS: *Blanchard v. Ellis*, 1 Gray, 195, 61 A. D. 417; *Trull v. Eastman*, 3 Metc. 121, 37 A. D. 126.

MINNESOTA: *Mankato v. Willard*, 13 Minn. 1, 97 A. D. 208 (semble).

MISSISSIPPI: *Andrews v. Anderson*, 16 So. 346.

MISSOURI: *Johnson v. Johnson*, 170 Mo. 34, 59 L. R. A. 748; *Ford v. Unity Church Soc.*, 120 Mo. 498, 41 A. S. R. 711.

NEW HAMPSHIRE: *Kimball v. Blaisdell*, 5 N. H. 533, 22 A. D. 476.

NEW JERSEY: *Moore v. Rake*, 26 N. J. Law, 574; *Brundred v. Walker*, 12 N. J. Eq. 140.

NEW YORK: *Utica Bank v. Mersereau*, 3 Barb. Ch. 528, 49 A. D. 189.

NORTH CAROLINA: *Bell v. Adams*, 81 N. C. 118.

OHIO: *Hart v. Gregg*, 32 Ohio St. 502.

OREGON: *Willson v. McEwan*, 7 Or. 87.

PENNSYLVANIA: *Brown v. McCormick*, 6 Watts, 60, 31 A. D. 450; *McPherson v. Cunliff*, 11 Serg. & R. 422, 14 A. D. 642; *McWilliams v. Nisly*, 2 Serg. & R. 507, 7 A. D. 654.

SOUTH DAKOTA: *Johnson v. Brauch*, 9 S. D. 116, 62 A. S. R. 857.

TENNESSEE: *Woods v. Bonner*, 89 Tenn. 411.

TEXAS: *Stone v. Sledge*, 87 Tex. 49, 47 A. S. R. 65.

VIRGINIA: *Gregory v. Peoples*, 80 Va. 355; *Doswell v. Buchanan's Ex'rs*, 3 Leigh, 365, 23 A. D. 280.

WEST VIRGINIA: *Buford v. Adair*, 43 W. Va. 211, 64 A. S. R. 854; *Mitchell v. Petty*, 2 W. Va. 470, 98 A. D. 777.

WISCONSIN: *North v. Henneberry*, 44 Wis. 306.

This rule applies to leases made by one without title. *Trevivan v. Lawrance*, 1 Salk. 276, 6 Mod. 256, 2 Ld. Raym. 1036; *Clark v. Baker*, 14 Cal. 612, 76 A. D. 449, 451 (semble); *McKenzie v. Lexington*, 4 Dana (Ky.) 129. But only to a limited extent. *Doe d. Strode v. Seaton*, 2 Crompt. M. & R. 728; *Langford v. Selmes*, 3 Kay & J. 220.

The rule applies also to mortgages made by one without title. *Kirkaldie v. Larrabee*, 31 Cal. 455, 89 A. D. 205 (statute); *Clark v. Baker*, 14 Cal. 612, 76 A. D. 449; *Thalls v. Smith*, 139 Ind. 496; *Kelley v. Jen-*

transferred with warranty, express or implied, by one without title.<sup>134</sup>

The title which the grantor is thus estopped to assert, it should be observed, is a paramount title outstanding in a third person at the time the conveyance is made. The grantor is not estopped from asserting a title subsequently acquired immediately or mediately from the grantee, either by purchase, involuntary sale, or adverse possession.<sup>135</sup>

(b) **Necessity and effect of covenants for title.** To work an estoppel, the deed must contain either a covenant for title or an express or implied recital that the grantor is seised of the estate attempted to be conveyed. In the absence of one or

ness, 50 Me. 455, 79 A. D. 623; *Ayer v. Phila. & B. Face Brick Co.*, 157 Mass. 57; *Haney v. Roy*, 54 Mich. 635; *Philly v. Sanders*, 11 Ohio St. 490, 78 A. D. 316; *Graham v. Meek*, 1 Or. 325; *Rauch v. Dech*, 116 Pa. 157, 2 A. S. R. 598; *Bradford v. Burgess*, 20 R. I. 290.

"It would perhaps more accurately state the situation, under our modern deeds of conveyance, to say that the deed, which the grantor engages to warrant and defend, is a solemn stipulation that the grantor has the title which he is now about to transfer to the grantee as a purchaser for value. In the face of this he cannot be heard to say, after making the transfer, that he had not that title at the time. So his new title lies lifeless in his hands against such purchaser; the estoppel not being a true conveyance." *Bigelow, Estop.* 384, 413 et seq.

<sup>134</sup> *Gottfried v. Miller*, 104 U. S. 521; *Dorsey v. Gassaway*, 2 Har. & J. (Md.) 402, 3 A. D. 557; *Clark v. Slaughter*, 34 Miss. 65; *Gardiner v. Suydam*, 7 N. Y. 357, 363 (semble); *Frazer v. Hilliard*, 2 Strob. (S. C.) 309.

This view has been criticised, however. See *Bigelow, Estop.* (5th Ed.) 446.

<sup>135</sup> *Doolittle v. Robertson*, 109 Ala. 412; *Franklin v. Dorland*, 28 Cal. 175, 87 A. D. 111; *Smiley v. Fries*, 104 Ill. 416; *Jones v. King*, 25 Ill. 383; *Ervin v. Morris*, 26 Kan. 664; *Berthelemy v. Johnson*, 3 B. Mon. (Ky.) 90, 38 A. D. 179; *Hines v. Robinson*, 57 Me. 324, 99 A. D. 772; *Stearns v. Hendersass*, 9 Cush. (Mass.) 497, 57 A. D. 65; *Thielen v. Richardson*, 35 Minn. 509; *Sherman v. Kane*, 86 N. Y. 57; *Cuthrell v. Hawkins*, 98 N. C. 203; *Rauch v. Dech*, 116 Pa. 157, 2 A. S. R. 598; *Foster v. Johnson*, 89 Tex. 640; *Harn v. Smith*, 79 Tex. 310, 23 A. S. R. 340.

the other of these, an estoppel does not arise.<sup>136</sup> It is sometimes said, indeed, that no estoppel arises unless the deed contains a covenant of warranty.<sup>137</sup> In some states, however, the same effect has been given to the covenant of seisin or right to convey,<sup>138</sup> the covenant for quiet enjoyment,<sup>139</sup> and, in equity at least, to the covenant for further assurance.<sup>140</sup> Moreover, an estoppel may arise, even though the deed contains no technical covenants whatever. If the deed bears on its face evidence that the grantor intended to convey, and that the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain proceeded

<sup>136</sup> *Clark v. Baker*, 14 Cal. 612, 76 A. D. 449, 453 (semble); *Frink v. Darst*, 14 Ill. 304, 58 A. D. 575, 578; *Partridge v. Patten*, 33 Me. 483, 54 A. D. 633; *Comstock v. Smith*, 13 Pick. (Mass.) 116, 23 A. D. 679; *Smith v. De Russy*, 29 N. J. Eq. 407; *Oliphant v. Burns*, 146 N. Y. 218, 233; *Jackson v. Littell*, 56 N. Y. 108; *Jackson d. McCrackin v. Wright*, 14 Johns. (N. Y.) 193; *Hart v. Gregg*, 32 Ohio St. 502; *Kinsman's Lease v. Loomis*, 11 Ohio, 475.

In some states the rule laid down in the text has been altered by statute so far as deeds purporting to convey a fee simple absolute are concerned. See, for example, *Holland v. Rogers*, 33 Ark. 251; *Clark v. Baker*, 14 Cal. 612, 76 A. D. 449.

A covenant against incumbrances, of course, estops the grantor from asserting a title subsequently acquired under a pre-existing incumbrance. *Coleman v. Bresnahan*, 54 Hun (N. Y.) 619.

<sup>137</sup> *Consolidated R. M. Min. Co. v. Lebanon Min. Co.*, 9 Colo. 343; *Weed Sew. Mach. Co. v. Emerson*, 115 Mass. 554; *Pelletreau v. Jackson*, 11 Wend. (N. Y.) 110.

<sup>138</sup> *Irvine v. Irvine*, 9 Wall. (U. S.) 617 (semble); *Smith v. Williams*, 44 Mich. 240 (semble); *Wightman v. Reynolds*, 24 Miss. 675. *Contra*, *Allen v. Sayward*, 5 Me. 227, 17 A. D. 221; *Doane v. Willcutt*, 5 Gray (Mass.) 328, 66 A. D. 369.

<sup>139</sup> *Goodtitle d. Edwards v. Bailey*, Cowp. 597; *Smith v. Williams*, 44 Mich. 240; *House v. McCormick*, 57 N. Y. 310; *Taggart v. Risley*, 4 Or. 235, 242. See, however, *Doane v. Willcutt*, 5 Gray (Mass.) 328, 66 A. D. 369.

<sup>140</sup> *Goodtitle d. Edwards v. Bailey*, Cowp. 597; *Bennett v. Waller*, 23 Ill. 97 (equity); *Hope v. Stone*, 10 Minn. 141 (Gil. 114). And see *Smith v. Williams*, 44 Mich. 240.

upon that footing, the deed creates an estoppel, although it contains no covenants for title in the technical sense.<sup>141</sup>

Whether a deed containing a covenant of warranty estops the grantor from asserting an after-acquired estate depends upon the nature both of the grant and of the warranty.<sup>142</sup>

— **Quitclaim deed.** A quitclaim deed without covenants does not estop the grantor from asserting an after-acquired title to the property;<sup>143</sup> and a covenant of warranty, even though general,<sup>144</sup> in a quitclaim deed, is generally limited in effect to such estate as the grantor then had, so that a subsequently acquired title may be asserted against the grantee.<sup>145</sup>

— **Purchase money mortgage.** If, upon a purchase and conveyance of land, the vendee gives back a mortgage with

<sup>141</sup> *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297, 322; *King v. Rea*, 56 Ind. 1, 18; *Bachelder v. Lovely*, 69 Me. 33, 38; *Hagensick v. Castor*, 53 Neb. 495; *Hannon v. Christopher*, 34 N. J. Eq. 459; *Magruder v. Esmay*, 35 Ohio St. 221; *Taggart v. Risley*, 4 Or. 235; *Root v. Crock*, 7 Pa. 378; *Lindsay v. Freeman*, 83 Tex. 259; *Reynolds v. Cook*, 83 Va. 817, 5 A. S. R. 317.

<sup>142</sup> *Bigelow*, *Estop.* (5th Ed.) 399; *McBride v. Greenwood*, 11 Ga. 379; *Bohon v. Bohon*, 78 Ky. 408; *Kinnear v. Lowell*, 34 Me. 299; *Comstock v. Smith*, 13 Pick. (Mass.) 116, 23 A. D. 670; *Blanchard v. Brooks*, 12 Pick. (Mass.) 47; *McInnis v. Pickett*, 65 Miss. 354; *Wightman v. Reynolds*, 24 Miss. 675; *Johnson v. Johnson*, 170 Mo. 34, 59 L. R. A. 748; *Jackson d. Van Keuren v. Hoffman*, 9 Cow. (N. Y.) 271; *Taggart v. Risley*, 4 Or. 235; *Mann v. Young*, 1 Wash. T. 454; *Western Min. & Mfg. Co. v. Peytonia C. C. Co.*, 8 W. Va. 406.

<sup>143</sup> *Doe d. McGill v. Shea*, 2 U. C. Q. B. 483; *Tillotson v. Kennedy*, 5 Ala. 407, 39 A. D. 330 (semble); *Haskett v. Maxey*, 134 Ind. 182, 19 L. R. A. 379; *Nicholson v. Caress*, 45 Ind. 479 (semble); *Fisher v. Hallock*, 50 Mich. 463 (semble); *Bogy v. Shoab*, 13 Mo. 365; *Hagensick v. Castor*, 53 Neb. 495; *Harden v. Cullins*, 8 Nev. 49; *Perrin v. Perrin*, 62 Tex. 477.

<sup>144</sup> *Hanrick v. Patrick*, 119 U. S. 156; *Holbrook v. Debo*, 99 Ill. 372; *Locke v. White*, 89 Ind. 492 (semble); *Hoxie v. Finney*, 16 Gray (Mass.) 332.

<sup>145</sup> *Quivey v. Baker*, 37 Cal. 465; *White v. Brocaw*, 14 Ohio St. 339; *Simon v. Stearns*, 17 Tex. Civ. App. 13; *Wynn v. Harman's devisees*, 5 Grat. (Va.) 157.

general warranty to secure the price, he is not thereby estopped to assert an after-acquired title against the mortgagee.<sup>146</sup>

— **Partition.** If partition of lands is made by writ, there is an implied warranty of the common title, and neither party may assert an after-acquired paramount title to that part of the land assigned to his former cotenants.<sup>147</sup> In the case of voluntary partition by conveyance, however, there is no estoppel<sup>148</sup> unless the deed in question contains the covenants or recitals necessary to create an estoppel in ordinary conveyances.<sup>149</sup>

(c) **Estoppel as conveyance of title.** It has commonly been held "that the presence of a covenant of general warranty in a conveyance will not only estop the grantor and his heirs from setting up an after-acquired title, but will, by force of the covenant, have the effect of actually transferring the new estate in the same manner as if it had originally passed by the deed. \* \* \* Few of the cases, however, required any decision of this question; and the statements of the courts are for the greater part mere generalities, having reference to the relation of grantor and grantee or their real privies."<sup>150</sup> By the better opinion, the estoppel merely renders the after-acquired title unavailable against the grantee. It does not operate to transfer the new estate to him immediately upon its

<sup>146</sup> *Randall v. Lower*, 98 Ind. 255; *Brown v. Phillips*, 40 Mich. 264. And see *Smith v. Cannell*, 32 Me. 123. *Contra*, *Hitchcock v. Fortier*, 65 Ill. 239.

<sup>147</sup> *Bigelow*, *Estop.* (5th Ed.) 409. See, however, *Walker v. Hall*, 15 Ohio St. 355, 86 A. D. 482.

<sup>148</sup> *Carson v. Carson*, 122 N. C. 645; *Harrison v. Ray*, 108 N. C. 215, 23 A. S. R. 57. And see *Doane v. Willcutt*, 5 Gray (Mass.) 328, 66 A. D. 369, 16 Gray, 368.

<sup>149</sup> *House v. McCormick*, 57 N. Y. 310; *Rountree v. Denson*, 59 Wis. 522. And see *Williams v. Gray*, 3 Me. 207, 14 A. D. 234.

<sup>150</sup> *Bigelow*, *Estop.* (5th Ed.) 429.

acquisition by the grantor.<sup>151</sup> Consequently, the grantor cannot compel the grantee to take the new title against his will, either in satisfaction of a covenant for title or in mitigation of damages for the breach of it.<sup>152</sup> In some cases, however, the theory of conveyance is the basis of decision, and the estoppel prevails in favor of the grantee, even against one who purchases the grantor's after-acquired title for value and without actual notice of the prior conveyance.<sup>153</sup> In other cases

<sup>151</sup> Bigelow, *Estop.* (5th Ed.) 384, 413 et seq.; *Burtners v. Keran*, 24 *Grat.* (Va.) 42. *Contra*, *Perkins v. Coleman*, 90 Ky. 611.

<sup>152</sup> *Burton v. Reeds*, 20 Ind. 87; *Blanchard v. Ellis*, 1 *Gray* (Mass.) 195, 61 A. D. 417; *Resser v. Carney*, 52 *Minn.* 397; *Woods v. North*, 6 *Humph.* (Tenn.) 309, 44 A. D. 312; *McInnis v. Lyman*, 62 *Wis.* 191. And see *McCarty v. Leggett*, 3 *Hill* (N. Y.) 134. *Contra*, *Boulter v. Hamilton*, 15 U. C. C. P. 125; *Reese v. Smith*, 12 *Mo.* 344.

It is otherwise where the grantor acquires the paramount title before the grantee is evicted under it. In this event, only nominal damages are recoverable. *King v. Gilson*, 32 *Ill.* 348, 83 A. D. 269; *Burton v. Reeds*, 20 Ind. 87; *Baxter v. Bradbury*, 20 *Me.* 260, 37 A. D. 49.

<sup>153</sup> *Trevivan v. Lawrance*, 1 *Salk.* 276, 2 *Ld. Raym.* 1036, 6 *Mod.* 256; *Doe d. Potts v. Dowdall*, 3 *Houst. (Del.)* 369, 11 A. R. 757; *Powers v. Patten*, 71 *Me.* 583; *Knight v. Thayer*, 125 *Mass.* 25; *Hooper v. Henry*, 81 *Minn.* 264; *Edwards v. Hillier*, 70 *Miss.* 803; *Oliphant v. Burns*, 146 *N. Y.* 218, 232 (semble); *Tefft v. Munson*, 57 *N. Y.* 97; *Philly v. Sanders*, 11 *Ohio St.* 490, 78 A. D. 316; *Wilson v. McEwan*, 7 *Or.* 87; *McCusker v. McEvey*, 9 *R. I.* 528, 11 A. R. 295; *Woods v. Bonner*, 89 *Tenn.* 411, 421; *Jarvis v. Aikens*, 25 *Vt.* 635. And see *Thalls v. Smith*, 139 *Ind.* 496; *Hale v. Hollon*, 14 *Tex. Civ. App.* 96. In some of these cases the recording acts influenced the decision.

If the purchaser of the after-acquired title has notice of the first deed, he is estopped the same as his grantor. *Letson v. Roach*, 5 *Kan. App.* 57; *Barker v. Circle*, 60 *Mo.* 258; *Wark v. Willard*, 13 *N. H.* 389; *Mann v. Young*, 1 *Wash. T.* 454, 462. It is otherwise if the first conveyance was made in fraud of creditors. *Gilliland v. Fenn*, 90 *Ala.* 230, 9 *L. R. A.* 413. The purchaser is estopped, also, if he does not show that he bought for value. *Lindsay v. Freeman*, 83 *Tex.* 259, 267; *Mann v. Young*, 1 *Wash. T.* 454, 462.

If two or more conveyances are made by a person having no title, a title subsequently acquired by him inures to the benefit of the first

this doctrine is denied, and the grantee cannot urge the estoppel against such a purchaser of the grantor's after-acquired title.<sup>154</sup>

**§ 152. Estoppel as to facts recited.**

A party to a deed is ordinarily estopped to dispute the truth of facts recited therein.<sup>155</sup> A recital, as used in the law of estoppel, is not only the preliminary statement of the inducement and purpose of the instrument, but also any distinct, material statement of fact in the writing.<sup>156</sup>

grantee. *Morrison v. Caldwell*, 5 T. B. Mon. (Ky.) 426, 17 A. D. 84. And see *Watkins v. Wassell*, 15 Ark. 73.

<sup>154</sup> *Bigelow, Estop.* (5th Ed.) 433; *Way v. Arnold*, 18 Ga. 181, 193; *Ford v. Unity Church Soc.*, 120 Mo. 498, 41 A. S. R. 711; *Bingham v. Kirkland*, 34 N. J. Eq. 229; *Calder v. Chapman*, 52 Pa. 359, 91 A. D. 163. And see *Gilliland v. Fenn*, 90 Ala. 230, 9 L. R. A. 413; *Chamberlain v. Meeder*, 16 N. H. 381; *Buckingham's Lessee v. Hanna*, 2 Ohio St. 551.

A conveyance by one having neither title nor seisin cannot operate against a subsequent purchaser whose deed is executed after title is obtained; but it is otherwise if the grantor had seisin when he first conveyed. *Bigelow, Estop.* (5th Ed.) 438, 444.

<sup>155</sup> UNITED STATES: *Brazee v. Schofield*, 124 U. S. 495; *Dundas v. Hitchcock*, 12 How. 256; *Crane v. Morris' Lessee*, 6 Pet. 598, 610.

DISTRICT OF COLUMBIA: *Morris v. Wheat*, 8 App. D. C. 379; *Anderson v. Reid*, 10 App. D. C. 426.

CONNECTICUT: *Stow v. Wyse*, 7 Conn. 214, 18 A. D. 99.

FLORIDA: *Collins v. Mitchell*, 5 Fla. 364.

GEORGIA: *Usina v. Wilder* 58 Ga. 178.

ILLINOIS: *Cobb v. Oldfield*, 151 Ill. 540, 42 A. S. R. 263; *Blackburn v. Bell*, 91 Ill. 434; *Lucas v. Beebe*, 88 Ill. 427.

IOWA: *Williams v. Swetland*, 10 Iowa, 51.

KENTUCKY: *Brandenburgh v. Three Forks Dep. Bank*, 19 Ky. L. R. 1974, 45 S. W. 108.

MASSACHUSETTS: *Dyer v. Rich*, 1 Metc. 180.

MISSOURI: *Tyler v. Hall*, 106 Mo. 313, 27 A. S. R. 337.

NORTH CAROLINA: *Wilkes County Com'rs v. Call*, 123 N. C. 308, 44 L. R. A. 252.

VIRGINIA: *Bower v. McCormick*, 23 Grat. 310.

See, generally, 7 Current Law, 1489.

<sup>156</sup> *Bigelow, Estop.* (5th Ed.) 365.



(a) **Recitals binding grantee.** The grantee as well as the grantor may be bound by recitals in the deed,<sup>157</sup> but he is not estopped, as a rule, unless he claims under the deed.<sup>158</sup> And if it appears that it was the intention of the parties that only one of them should be bound by the recital, then the other is not estopped to deny its truth.<sup>159</sup>

(b) **Recitals of conclusions of law.** As a rule, recitals are of matter of fact; but the recital of a conclusion of law may be equally binding. Thus, a party may be precluded from denying the validity of a patent by reason of recitals in his deed.<sup>160</sup> However, a recital of this nature would not preclude a party from denying the legality or lawfulness of the transaction or instrument thus recited. And a recital in a municipal bond of power to issue it does not estop the municipality from disputing the validity of the bond for want of power.<sup>161</sup>

(c) **Certainty—General and particular recitals.** The recital must be certain, else an estoppel does not arise.<sup>162</sup> With

<sup>157</sup> *Hanly v. Blackford*, 1 Dana (Ky.) 1, 25 A. D. 114. See, also, page 534, *infra*.

<sup>158</sup> *Graves v. Colwell*, 90 Ill. 612. See, also, page 534, *infra*. Recitals as estoppels depend on the same principles with admissions. They estop only the party making them and those claiming under him. *Stevenson's Heirs v. McReary*, 12 Smedes & M. (Miss.) 9, 51 A. D. 102, 114; *Morse v. Bellows*, 7 N. H. 549, 23 A. D. 372.

Recitals in a deed poll estop the grantee only under those circumstances in which declarations of the grantor to the same effect, made at the time of executing the deed, would be admissible against the grantee. *Joeckel v. Easton*, 11 Mo. 118, 47 A. D. 142.

<sup>159</sup> *Blackhall v. Gibson*, 2 L. R. Ir. 49; *Stroughill v. Buck*, 14 Q. B. 781; *Bower v. McCormick*, 23 Grat. (Va.) 310.

<sup>160</sup> *Bowman v. Taylor*, 2 Adol. & E. 278; *Hills v. Laming*, 9 Exch. 256.

To raise an estoppel, the recital must be distinct and precise. *Jackson v. Allen*, 120 Mass. 64.

<sup>161</sup> *Northern Bank v. Porter Township Trustees*, 110 U. S. 608; *Lake County v. Graham*, 130 U. S. 674; *Wilkes County Com'rs v. Call*, 123 N. C. 308, 44 L. R. A. 252. See, also, pages 526, 541, *infra*.

<sup>162</sup> *School Dist. v. Stone*, 106 U. S. 183; *Zimmier v. San Luis Water Co.*,

this idea in mind, recitals have been classified as being either general or particular.

General recitals are such as do not definitely affirm or deny the existence of some fact or either expressly or impliedly show a clear intention of the parties that either one or the other or both of them shall be concluded from disputing the fact recited. These do not work an estoppel as to the fact in question.<sup>163</sup> Thus, a recital in the alternative is not conclusive of either alternative alone. A party may deny its truth as to one of the alternatives.<sup>164</sup>

Particular recitals, on the other hand, are such as definitely affirm or deny the existence of some fact, and either expressly or impliedly show a clear intention of the parties that either one or the other or both of them shall be precluded from asserting anything to the contrary. These are binding.<sup>165</sup> Thus,

57 Cal. 221; *Hubbard v. Norton*, 10 Conn. 422; *Hays v. Askew*, 50 N. C. (5 Jones, Law) 63; *Linney v. Woods*, 66 Tex. 22.

<sup>163</sup> *Kepp v. Wiggett*, 10 C. B. 35; *Farrar v. Cooper*, 34 Me. 394; *Spofford v. Hobbs*, 29 Me. 148, 48 A. D. 521; *Jackson v. Allen*, 120 Mass. 64; *Stevenson's Heirs v. McReary*, 12 Smedes & M. (Miss.) 9, 51 A. D. 102, 114; *Lot v. Thomas*, 2 N. J. Law, 407, 2 A. D. 354; *Purdy v. Coar*, 109 N. Y. 448, 4 A. S. R. 491; *Hall v. Benner*, 1 Pen. & W. (Pa.) 402, 21 A. D. 394; *McDonald v. Lusk*, 9 Lea (Tenn.) 654; *Sheffey's Ex'r v. Gardiner*, 79 Va. 313.

It has been said, indeed, that a mere recital of a particular fact does not preclude the parties from denying it. There must be a direct affirmation of the fact. *Bower v. McCormick*, 23 Grat. (Va.) 310.

<sup>164</sup> *Right d. Jefferys v. Bucknell*, 2 Barn. & Ad. 278.

<sup>165</sup> *Lainson v. Tremere*, 1 Adol. & E. 792; *Carpenter v. Buller*, 8 Mees. & W. 209; *Root v. Crock*, 7 Pa. 378; *Hall v. Benner*, 1 Pen. & W. (Pa.) 402, 21 A. D. 394; *Anderson v. Phlegar*, 93 Va. 415.

A recital that a deed of conveyance is made subject to a certain mortgage estops the grantee from denying the lien. *Johnson v. Thompson*, 129 Mass. 398. *Contra*, *Goodman v. Randall*, 44 Conn. 321. This is true, of course, where the grantee covenants to pay the mortgage. *Parkinson v. Sherman*, 74 N. Y. 88, 30 A. R. 268; *Freeman v. Auld*, 44 N. Y. 50; *McConihe v. Fales*, 107 N. Y. 404. The recital does not thus estop the grantee if it is general. *Purdy v. Coar*, 109 N. Y. 448, 4 A. S.

if a deed of conveyance bounds the land upon a street or private way, the parties cannot deny the existence of the street or way.<sup>166</sup> So, the sureties in a bond of a person acting in an official or representative capacity are estopped to deny their principal's capacity.<sup>167</sup> Again, the obligors in a forthcoming bond given in attachment or replevin are estopped to deny that the defendant owned the property<sup>168</sup> and was in possession of it<sup>169</sup> when the bond was given. And recitals in municipal bonds of preliminary facts touching the regularity of their issuance estop the municipality from denying those facts.<sup>170</sup>

R. 491. Nor if it was made for a collateral purpose, and not to bind the grantee. *Weed Sew. Mach. Co. v. Emerson*, 115 Mass. 554; *Calkins v. Copley*, 29 Minn. 471.

<sup>166</sup> *Espley v. Wilkes*, L. R. 7 Exch. 298; *Seeger v. Mueller*, 133 Ill. 86; *Riley v. Stein*, 50 Kan. 591; *Sheen v. Stothart*, 29 La. Ann. 630; *Tohey v. Taunton*, 119 Mass. 404; *Fox v. Union Sugar Refinery*, 109 Mass. 292; *Parker v. Smith*, 17 Mass. 413, 9 A. D. 157; *Dawson v. St. P. F. Ins. Co.*, 15 Minn. 136, 2 A. R. 109, 113 (semble); *Lindsay v. Jones*, 21 Nev. 72; *Lennig v. Ocean City Ass'n*, 41 N. J. Eq. 606, 56 A. R. 16, 18; *Moose v. Carson*, 104 N. C. 431, 17 A. S. R. 681; *Donohoo v. Murray*, 62 Wis. 100. See *Bell v. Todd*, 51 Mich. 21.

<sup>167</sup> *Bruce v. U. S.*, 17 How. (U. S.) 437; *Norris v. State*, 22 Ark. 524; *Gray v. State*, 78 Ind. 68, 41 A. R. 545; *Jones v. Gallatin County*, 78 Ky. 491; *Williamson v. Woodman*, 73 Me. 163; *Cutler v. Dickinson*, 8 Pick. (Mass.) 386; *Kelly v. State*, 25 Ohio St. 567; *Cecil v. Early*, 10 Grat. (Va.) 198. See, however, *Kepp v. Wiggett*, 10 C. B. 35.

On the same principle, a mortgagor is estopped to deny the mortgagee's official capacity. *Floyd County v. Morrison*, 40 Iowa, 188.

Sureties are also estopped to assert that the principal was dead when the bond was made. *Collins v. Mitchell*, 5 Fla. 364. But they may show that the obligee was then dead. *Tait v. Frow*, 8 Ala. 543.

<sup>168</sup> *Mitchell v. Ingram*, 38 Ala. 395; *Gray v. MacLean*, 17 Ill. 404.

The rule of the text applies also to a claimant of the property who becomes a party to the bond. *Page v. Butler*, 15 Mo. 73.

<sup>169</sup> *Benesch v. Waggner*, 12 Colo. 534, 13 A. S. R. 254; *Martin v. Gilbert*, 119 N. Y. 298, 16 A. S. R. 823; *Griswold v. Lundback*, 4 S. D. 441. See, also, *Roswald v. Hobbie*, 85 Ala. 73, 7 A. S. R. 23.

The mere fact that a recital is expressed in general terms does not defeat an estoppel, provided that it is certain as to the fact in question and as to the intention of the parties to be bound. Nor, on the other hand, does an estoppel arise from a recital expressed in particular terms, unless it appears that it was the intention of the parties that the statement should not be disputed.<sup>171</sup> Thus, by the weight of authority, the ordinary acknowledgment of receipt of consideration in a deed is not construed as a contract that the statement shall be binding, and it is not conclusive between the parties, except for the purpose of giving effect to the operative words in the deed.<sup>172</sup>

<sup>170</sup> *Webb v. Herne Bay Com'rs*, L. R. 5 Q. B. 642; *Northern Bank v. Porter Tp.*, 110 U. S. 608; *Independent School Dist. v. Rew*, 111 Fed. 1, 55 L. R. A. 364; *Flagg v. School Dist. No. 70*, 4 N. D. 30, 25 L. R. A. 363; *Coler v. Dwight School Tp.*, 3 N. D. 249, 28 L. R. A. 649. See, however, *Nat. L. Ins. Co. v. Mead*, 13 S. D. 37, 48 L. R. A. 785.

The same is true of recitals in conveyances by municipal corporations. *Gordon v. San Diego*, 101 Cal. 522, 40 A. S. R. 73.

The recital must distinctly and necessarily import the fact in question, else the municipality is not estopped to deny that fact. *School Dist. v. Stone*, 106 U. S. 183.

A recital cannot preclude an inquiry into the powers of a corporation, however. Section 152(b), *supra*.

<sup>171</sup> *South Eastern R. Co. v. Warton*, 6 Hurl. & N. 520; *Blackhall v. Gibson*, 2 L. R. Ir. 49; *Butler University v. Scoonover*, 114 Ind. 381, 6 A. S. R. 627; *Muhlenberg v. Druckenmiller*, 103 Pa. 631.

A covenant against incumbrances does not estop the grantor from asserting that the deed was accepted subject to a certain incumbrance which the grantee agreed to pay as part of the price. *Bolles v. Beach*, 22 N. J. Law, 680, 53 A. D. 263.

<sup>172</sup> *Mobile & M. R. Co. v. Wilkinson*, 72 Ala. 286; *Irvine v. McKeon*, 23 Cal. 472; *Union M. L. Ins. Co. v. Kirchoff*, 133 Ill. 368; *Goodspeed v. Fuller*, 46 Me. 141, 71 A. D. 572; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 A. D. 103; *Watson v. Blaine*, 12 Serg. & R. 131, 14 A. D. 669. And see *Hanson v. Buckner's Ex'r*, 4 Dana (Ky.) 251, 29 A. D. 401; *Miller v. Goodwin*, 8 Gray (Mass.) 542.

A party cannot dispute the recital for the purpose of destroying the operation of the deed as a conveyance. *Mobile & M. R. Co. v. Wil-*

(d) **Materiality—Collateral matters.** To work an estoppel, the recital must be of a fact material and necessary to the purposes of the deed.<sup>173</sup> Recitals in a deed work an estoppel as to the facts recited only where the deed itself is the foundation of the cause of action or defense. The estoppel does not arise where the action is wholly collateral to the main object of the deed.<sup>174</sup> While the deed is admissible in a collateral dispute as an admission of the facts recited in it,<sup>175</sup> it is not binding on the parties to it.

If a recital is made for one purpose only, it is not binding for any other purpose.<sup>176</sup>

§ 153. **Persons estopped, and entitled to urge estoppel.**

(a) **Parties to deed—In general.** In the case of a deed of

kinson, 72 Ala. 286; *Campbell v. Carruth*, 32 Fla. 264; *Day v. Davis*, 64 Miss. 253; *McMullin v. Glass*, 27 Pa. 151. And it has been held that a consideration different from or further than that expressed in the deed cannot be proved. *Houston v. Blackman*, 66 Ala. 559, 41 A. R. 756; *Malgley v. Hauer*, 7 Johns. (N. Y.) 341; *Wilkinson v. Wilkinson*, 17 N. C. (2 Dev. Eq.) 376.

<sup>173</sup> *Blackhall v. Gibson*, 2 L. R. Ir. 49; *Osborne v. Endicott*, 6 Cal. 149, 65 A. D. 498; *Walker v. Sioux City & I. F. T. Lot Co.*, 65 Iowa, 563; *Baldwin v. Thompson*, 15 Iowa, 504; *Reed v. McCourt*, 41 N. Y. 435; *Den d. Brinegar v. Chaffin*, 14 N. C. (3 Dev.) 108, 22 A. D. 711; *Hall v. Benner*, 1 Pen. & W. (Pa.) 402, 21 A. D. 394.

An estoppel arising out of the acceptance of a deed is restricted to the estate which the deed undertakes to transfer. *Fisher v. Cid C. Min. Co.*, 97 N. C. 95.

<sup>174</sup> *South Eastern R. Co. v. Warton*, 6 Hurl. & N. 520; *Fraser v. Pendlebury*, 31 Law J. C. P. 1; *Carpenter v. Buller*, 8 Mees. & W. 209; *Bank of America v. Banks*, 101 U. S. 240, 247; *Claffin v. Boston & A. R. Co.*, 157 Mass. 489, 20 L. R. A. 638; *Reed v. McCourt*, 41 N. Y. 435; *Linney v. Wood*, 66 Tex. 22.

The estoppel may be urged in an action to enforce rights arising out of the deed, however, though not based upon it. *Wiles v. Woodward*, 5 Exch. 557, 563.

<sup>175</sup> *Carpenter v. Buller*, 8 Mees. & W. 209, 213 (semble).

<sup>176</sup> *South Eastern R. Co. v. Warton*, 6 Hurl. & N. 520; *Weed Sew.*

indenture, both parties are estopped to assert anything in derogation of it, and ordinarily to deny the truth of its recitals.

In the case of a deed poll, a distinction is to be noted between the right to assert a title in derogation of the conveyance and the right to deny the truth of its recitals. The grantor in such a deed is estopped to assert a derogatory right or title,<sup>177</sup> but the grantee is not thus bound,—this latter being an important exception to the commonly asserted rule that an estoppel must be mutual, else it does not bind either party.<sup>178</sup> As to recitals in a deed poll, the grantor is ordinarily estopped by them;<sup>179</sup> and this is true as to the grantee also if he claims under the deed,<sup>180</sup> but not otherwise.

—**Parties acting in representative capacity.** If a deed is made in a representative capacity, the principal is estopped only so far as the deed was authorized. The state, for instance, is not estopped by the unauthorized deeds of its officers.<sup>181</sup>

A deed made by a person individually does not estop him in a representative capacity.<sup>182</sup> Thus, a trustee is not estopped as such by a deed previously made by him as an individual.<sup>183</sup>

*Mach. Co. v. Emerson*, 115 Mass. 554; *Calkins v. Copley*, 29 Minn. 471; *Fisher v. Cld C. Min. Co.*, 97 N. C. 95; *McCullough v. Dashiell*, 78 Va. 634.

<sup>177</sup> *McCusker v. McEvey*, 9 R. I. 528, 11 A. R. 295.

<sup>178</sup> *Robertson v. Pickrell*, 109 U. S. 608, 614; *Cooper v. Watson*, 73 Ala. 252; *Winlock v. Hardy*, 4 Litt. (Ky.) 272; *Great Falls Co. v. Worster*, 15 N. H. 412; *Sparrow v. Kingman*, 1 N. Y. 242, 249.

It is otherwise where the deed contains covenants on the part of the grantee and he accepts the deed. *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 A. R. 556. See, however, *Gardner v. Greene*, 5 R. I. 104.

A tenant under a lease by deed poll is estopped to deny his landlord's title, but this is estoppel in pais. See § 158(c), *infra*.

<sup>179</sup> Section 152, *supra*.

<sup>180</sup> Section 152(a), *supra*, and page 534, *infra*.

<sup>181</sup> *Heyward v. Farmers' Min. Co.*, 42 S. C. 138, 46 A. S. R. 702.

<sup>182</sup> *Administrator. Metters v. Brown*, 1 Hurl. & C. 686. *Agent. Franklin v. Dorland*, 28 Cal. 175, 87 A. D. 111. *Head of family. Hall v. Matthews*, 68 Ga. 490.

As to whether a deed made in a representative capacity estops the grantor individually, the cases are not in accord. By the weight of authority, perhaps, the grantor is estopped to assert an individual right or title in derogation of the deed,<sup>184</sup> but there is respectable authority to the contrary.<sup>185</sup>

A deed accepted in a representative capacity does not estop the grantee individually.<sup>186</sup>

Persons acting by authority of the grantee stand in his shoes and may urge the estoppel against the grantor.<sup>187</sup>

(b) **Privies.** Persons in privity with the parties to a deed are bound by the estoppel created by the instrument,<sup>188</sup> and

<sup>183</sup> *Phillippi v. Leet*, 19 Colo. 246; *Dewhurst v. Wright*, 29 Fla. 223; *Kelley v. Jenness*, 50 Me. 455, 79 A. D. 623; *Runlet v. Otis*, 2 N. H. 167; *Burchard v. Hubbard*, 11 Ohio, 316; *Freteilliere v. Hindes*, 57 Tex. 392; *Gregory v. Peoples*, 80 Va. 355.

<sup>184</sup> *Deed by administrator.* *Jones v. King*, 25 Ill. 383; *Johnson v. Brauch*, 9 S. D. 116, 62 A. S. R. 857; *Prouty v. Mather*, 49 Vt. 415. *Deed by agent.* *Stow v. Wyse*, 7 Conn. 214, 18 A. D. 99; *Blanchard v. Tyler*, 12 Mich. 339, 86 A. D. 57; *North v. Henneberry*, 44 Wis. 306. *Deed by assignee in bankruptcy.* *Hitchcock v. Southern I. & T. Co.* (Tenn. Ch.) 38 S. W. 588. *Deed by guardian.* *Morris v. Wheat*, 8 App. D. C. 379; *Heard v. Hall*, 16 Pick. (Mass.) 457; *Foote v. Clark*, 102 Mo. 394, 11 L. R. A. 861. And see *Wells v. Steckelberg*, 52 Neb. 597, 66 A. S. R. 529. *Deed by partner.* *Sutline v. Jones*, 61 Ga. 676. *Deed by trustee.* *Rogers v. Donnellan*, 11 Utah, 108, 113 (semble).

<sup>185</sup> *Deed by administrator.* *Wright v. De Groff*, 14 Mich. 164; *Jackson d. Van Keuren v. Hoffman*, 9 Cow. (N. Y.) 271. And see *Gjerstadengen v. Hartzell*, 9 N. D. 268, 81 A. S. R. 575. *Deed by agent.* *Smith v. Penny*, 44 Cal. 161; *Carothers v. Alexander*, 74 Tex. 309. And see *Consol. Rep. Mt. Min. Co. v. Lebanon Min. Co.*, 9 Colo. 343.

If an executor, as such, conveys land in which he has a title individually, he is estopped by the deed to assert that title against the grantee. But if he does not acquire title individually until after his conveyance as executor, he is not estopped to assert it. *Allen v. Sayward*, 5 Me. 227, 17 A. D. 221, 223.

<sup>186</sup> *Seabury v. Stewart*, 22 Ala. 207, 58 A. D. 254.

<sup>187</sup> *Osgood v. Abbott*, 58 Me. 73.

<sup>188</sup> Privies in estate, in blood, and in law are thus bound. *Doe d. Leeming v. Skirrow*, 2 Nev. & P. 123; *Kimball v. Blaisdell*, 5 N. H. 533,

may take advantage of it.<sup>189</sup> "In the law of estoppel, privity signifies (1) merely succession of rights,—that is, the devolution, in whole or in part, of the rights and duties of one person upon another, as in the case of the succession of an assignee in bankruptcy to the estate of the bankrupt on the one hand, and to the rights of the creditors on the other,<sup>190</sup>—or (2) the derivation of rights by one person from and holding in subordination to those of another, as in the case of a tenant."<sup>191</sup> Accordingly, a person is not bound by the estoppel on another, nor may he urge it, unless he succeeds to his position, or holds subordinately to it.<sup>192</sup> An heir claiming an independent

22 A. D. 476, 478; *Tefft v. Munson*, 57 N. Y. 99. Thus, heirs may be bound by an estoppel against the ancestor. *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297; *Jackson v. Rowell*, 87 Ala. 685, 4 L. R. A. 637; *Ford's Lessee v. Hays*, 1 Har. (Del.) 48, 23 A. D. 369; *Massie v. Sebastian*, 4 Bibb (Ky.) 433; *Lawry v. Williams*, 13 Me. 281; *Bates v. Norcross*, 17 Pick. (Mass.) 14, 28 A. D. 271; *Moore v. Rake*, 26 N. J. Law, 574; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 A. D. 189; *Bell v. Adams*, 81 N. C. 118; *Carson v. New Bellevue Cem. Co.*, 104 Pa. 575; *McWilliams v. Nisley*, 2 Serg. & R. (Pa.) 507, 7 A. D. 654; *Wingo v. Parker*, 19 S. C. 9; *Buford v. Adair*, 43 W. Va. 211, 64 A. S. R. 854. And the same is true of devisees. *Hitchcock v. So. I. & T. Co.* (Tenn. Ch.) 38 S. W. 588.

<sup>189</sup> Heirs and devisees may take advantage of an estoppel in favor of the ancestor. *Jones v. King*, 25 Ill. 383; *Logan v. Moore*, 7 Dana (Ky.) 74; *Lawry v. Williams*, 13 Me. 281; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 A. D. 189.

<sup>190</sup> This includes privies in blood and privies in law. See note 188, *supra*.

<sup>191</sup> *Bigelow, Estop.* (5th Ed.) 347; *Taylor v. Needham*, 2 Taunt. 278.

A tenant is bound by an estoppel on the landlord, where his title as tenant is derived after the estoppel arises. *Den d. Bufferlow v. Newsom*, 12 N. C. (1 Dev.) 208, 17 A. D. 565.

<sup>192</sup> *New Orleans v. Gaines' Adm'r*, 138 U. S. 595, 614; *Gorton v. Roach*, 46 Mich. 294.

Kinship alone, whether by affinity or consanguinity, does not create privity for the purpose of estoppel. This arises only where the heir represents the ancestor and continues his estate. *Trolan v. Rogers*, 88 Hun (N. Y.) 422.



title in himself is not bound by an estoppel on his ancestor.<sup>193</sup> Nor do judgment debtor and creditor stand in privity. Consequently, a creditor levying on land may not take advantage of an estoppel created by a deed thereof to the debtor, where the creditor does not buy in the land.<sup>194</sup>

— **Privity between grantee and grantor.** The grantee of a party to a deed of conveyance is not in privity with him, by the modern rule, so as to be bound by, or entitled to take advantage of, the estoppel created by the deed.<sup>195</sup>

It is sometimes said that where two persons trace title to the same grantor, each is estopped, as against the other, to deny that grantor's title. This statement, however, is too broad, since one of two grantees from the same grantor may connect himself with, and assert against the other, a title paramount to that of the common grantor.<sup>196</sup> If a grantee asserts no other right or title than that conveyed by the deed, however, he is estopped to deny his grantor's title as against an-

<sup>193</sup> *Ebey v. Adams*, 135 Ill. 80, 10 L. R. A. 162; *Bohon v. Bohon*, 78 Ky. 408; *Russ v. Alpaugh*, 118 Mass. 369, 19 A. R. 464; *Foote v. Clark*, 102 Mo. 394, 11 L. R. A. 861; *Chauvin v. Wagner*, 18 Mo. 531; *Trolan v. Rogers*, 88 Hun (N. Y.) 422; *Kerbough v. Vance*, 6 Baxt. (Tenn.) 110; *McCorry v. King's Heirs*, 3 Humph. (Tenn.) 267, 39 A. D. 165.

<sup>194</sup> *Water's Appeal*, 35 Pa. 523, 78 A. D. 354, 356.

However, a creditor who levies execution on land, and buys it in, is bound by an estoppel on the debtor as owner. *Kimball v. Blaisdell*, 5 N. H. 533, 22 A. D. 476. And a purchaser at execution sale of the property may take advantage of an estoppel arising from the deed by which the debtor acquired title. *Dodge v. Walley*, 22 Cal. 224, 83 A. D. 61. And he is estopped by a deed made by the debtor before the sheriff's sale. *Gilliam v. Bird*, 30 N. C. (8 Ired.) 280, 49 A. D. 379.

Estoppel by sheriff's deed, see § 154(a), *infra*.

<sup>195</sup> *Cooper v. Watson*, 73 Ala. 252; *Gwinn v. Smith*, 55 Ga. 145; *Winlock v. Hardy*, 4 Litt. (Ky.) 272; *McLeery v. McLeery*, 65 Me. 172, 20 A. R. 683; *Preiner v. Meyer*, 67 Minn. 197; *Cummings v. Powell*, 97 Mo. 524.

<sup>196</sup> *Bigelow, Estop.* (5th Ed.) 346; *Rice v. St. L., A. & T. R. Co.*, 87 Tex. 90, 47 A. S. R. 75.

other person claiming under a deed from the same grantor.<sup>197</sup> The rule is the same with reference to defeating the dower right of the widow of the grantor. A grantee may set up insufficient seisin on part of the grantor, or a paramount title in a third person, as against the widow's demand for dower,<sup>198</sup> but, unless he does this, the grantee cannot thus defeat the dower right.<sup>199</sup>

If a person without title conveys land by deed with warranty, the estoppel arising against him to assert an after-acquired title may be taken advantage of, not only by his grantee, but also by one to whom the grantee has conveyed the premises. This is allowed, however, because the covenant of warranty in the original deed runs with the land.<sup>200</sup> If a per-

<sup>197</sup> *Lewis v. Watson*, 98 Ala. 479, 39 A. S. R. 82; *Anderson v. Reid*, 10 App. D. C. 426; *Doyle v. Wade*, 23 Fla. 90, 11 A. S. R. 334; *Hasselman v. U. S. Mortg. Co.*, 97 Ind. 365; *Addison v. Crow*, 5 Dana (Ky.) 271; *Bedford v. Urquhart*, 8 La. 234, 28 A. D. 137; *Griffin v. Sheffield*, 38 Miss. 359, 77 A. D. 646; *Wells v. Steckelberg*, 52 Neb. 597, 66 A. S. R. 529; *Bernhardt v. Brown*, 122 N. C. 587, 65 A. S. R. 725; *Alexander v. Gibbon*, 118 N. C. 796, 54 A. S. R. 757; *Bynum v. Miller*, 86 N. C. 559, 41 A. R. 467; *Gilliam v. Bird*, 30 N. C. (8 Ired.) 280, 49 A. D. 379; *Eagle Woolen Mills Co. v. Monteith*, 2 Or. 277; *Ames v. Beckley*, 48 Vt. 395; *Bolling v. Teel*, 76 Va. 487; *Schwallback v. Chicago, M. & St. P. R. Co.*, 69 Wis. 292, 2 A. S. R. 740. See, however, *Joeckel v. Easton*, 11 Mo. 118, 47 A. D. 142; *Frey v. Ramsour*, 66 N. C. 466; *Rice v. St. L., A. & T. R. Co.*, 87 Tex. 90, 47 A. S. R. 72, and note.

Application of this rule to tenants in common, see note, 47 A. S. R. 78; *Sands v. Davis*, 40 Mich. 14; *Pillow v. S. W. Va. Imp. Co.*, 92 Va. 144, 53 A. S. R. 804.

Properly speaking, this rule does not rest on a relation of privity between grantor and grantee. *Bigelow, Estop.* (5th Ed.) 346, 347.

<sup>198</sup> *Cobb v. Oldfield*, 151 Ill. 540, 42 A. S. R. 263; *Foster v. Dwinel*, 49 Me. 44; *Sparrow v. Kingman*, 1 N. Y. 242.

<sup>199</sup> *Ketchum v. Schicketanz*, 73 Ind. 137; *Dashiel v. Collier*, 4 J. J. Marsh. (Ky.) 601; *Wedge v. Moore*, 6 Cush. (Mass.) 8; *Ward's Heirs v. McIntosh*, 12 Ohio St. 231; *Gayle v. Price*, 5 Rich. Law (S. C.) 525.

<sup>200</sup> *Scoffins v. Grandstaff*, 12 Kan. 467; *Powers v. Patten*, 71 Mo. 583; *Comstock v. Smith*, 13 Pick. (Mass.) 116, 23 A. D. 670, 671 (semble);

son without title, having conveyed land by deed with warranty, subsequently acquires title and conveys it to another, the second grantee is not in privity with the grantor, and he may accordingly, in some states, assert the after-acquired title against the first grantee. In many states, indeed, the second grantee is bound by the estoppel on the grantor, not, however, because of privity, but because the estoppel operates to transfer the after-acquired title to the first grantee immediately on its acquisition by the grantor.<sup>201</sup>

While a grantee is not in privity with his grantor, yet he is bound by proper recitals in the deed, and the same is true of recitals in remote deeds in his chain of title.<sup>202</sup> He is thus bound, however, only where he claims under the deed. Even though a recital is in proper form to bind him, he is not estopped by it if he does not claim under the deed in which it is contained.<sup>203</sup>

**(c) Strangers to deed—Mutuality of estoppel.** It is frequently said that an estoppel must be mutual, else it will not operate as a bar, and that, unless both parties are bound, neither will be concluded.<sup>204</sup> So far as the parties to the deed

*Johnson v. Johnson*, 170 Mo. 34, 59 L. R. A. 748; *Fordyce v. Rapp*, 131 Mo. 354; *Pillsbury v. Alexander*, 40 Neb. 242; *Coleman v. Bresnahan*, 54 Hun (N. Y.) 619; *Stone v. Sledge*, 87 Tex. 49, 47 A. S. R. 65.

<sup>201</sup> Section 151(c), *supra*.

<sup>202</sup> *Brazee v. Schofield*, 124 U. S. 495; *Crane v. Morris' Lessee*, 6 Pet. (U. S.) 598, 611; *Morris v. Wheat*, 8 App. D. C. 379; *Anderson v. Reid*, 10 App. D. C. 426; *Orthwein v. Thomas*, 127 Ill. 554, 11 A. S. R. 159; *Kinsman's Lessee v. Loomis*, 11 Ohio, 475; *Stone v. Fitts*, 38 S. C. 393. See, also, § 152(a), *supra*.

<sup>203</sup> *Cobb v. Oldfield*, 151 Ill. 540, 42 A. S. R. 263; *Hovey v. Woodward*, 33 Me. 470; *Muhlenberg v. Druckenmiller*, 103 Pa. 631; *Sunderlin v. Struthers*, 47 Pa. 411; *Linney v. Wood*, 66 Tex. 22. See, also, § 152(a), *supra*.

It has been held, however, that if a person conveys another's land as agent, his subsequent grantees are estopped to assert that he had no authority to convey. *Stow v. Wyse*, 7 Conn. 214, 18 A. D. 99.

<sup>204</sup> *Hovey v. Woodward*, 33 Me. 470, 477; *Horton v. Kelly*, 40 Minn.

and their privies are concerned, this statement is too broad. It is subject to important exceptions in the case of deeds poll in regard both to the assertion of a right or title in derogation of the deed and to the denial of facts recited in it.<sup>205</sup> In respect to strangers to the deed, however, the rule of mutuality finds a proper sphere of application. One who is neither a party to a deed nor in privity with a party to it is not estopped by the deed,<sup>206</sup> nor may he take advantage of the estoppel created by the instrument.<sup>207</sup>

**§ 154. Execution, validity, and construction of deed.**

**(a) Execution, delivery, and acceptance.** To bind a grantor

193; *Stevenson's Heirs v. McReary*, 12 Smedes & M. (Tenn.) 9, 51 A. D. 102, 114; *Millard v. McMullin*, 68 N. Y. 345, 353; *Sparrow v. Kingman*, 1 N. Y. 242, 246, 248.

<sup>205</sup> A deed poll may estop the grantor and not the grantee. Section 153(a), *supra*.

A recital may estop one party and not the other. Section 152(a), *supra*.

<sup>206</sup> *Robinson v. Bates*, 3 Metc. (Mass.) 40, 42 (semble); *Davis v. Agnew*, 67 Tex. 206, 215.

<sup>207</sup> *Re Ghosts' Trusts*, 49 Law T. (N. S.) 588; *Branson v. Wirth*, 17 Wall. (U. S.) 32; *Franklin v. Dorland*, 28 Cal. 175, 87 A. D. 111; *McKinney v. Lanning*, 139 Ind. 170; *Robinson v. Bates*, 3 Metc. (Mass.) 40; *Stevenson's Heirs v. McReary*, 12 Smedes & M. (Mass.) 9, 51 A. D. 102; *Jackson v. Woodruff*, 1 Cow. (N. Y.) 276, 13 A. D. 525; *Kitzmiller v. Van Rensselaer*, 10 Ohio St. 63; *Sunderlin v. Struthers*, 47 Pa. 411; *McCullough v. Dashiell*, 78 Va. 634.

However, recitals in a deed are admissible in favor of a stranger as admissions of the party making them. *Franklin v. Dorland*, 28 Cal. 175, 87 A. D. 111.

It has been held that a stranger in possession of land may, when sued in ejectment, show that the plaintiff, before he acquired title, conveyed the land to a third person, and is so disentitled to recover. *Perkins v. Coleman*, 90 Ky. 611. This decision allows a stranger to assert the estoppel arising from a deed made by one without title, and is based on the doctrine that the estoppel operates to transfer the after-acquired title to the grantee immediately on its acquisition by the grantor. In many states, and perhaps by the better opinion, this decision would not be sustained. See § 151(c), *supra*.

by estoppel, the deed must be his own voluntary act. A deed made pursuant to a judicial sale in proceedings in invitum does not estop the debtor as grantor of the property conveyed.<sup>208</sup>

A grantor is not estopped by a deed which he has never delivered;<sup>209</sup> and to create an estoppel against the grantee, he must have accepted the deed.<sup>210</sup>

The failure to acknowledge a deed does not defeat the estoppel as between the parties and those claiming under them with notice of the conveyance.<sup>211</sup>

(b) **Modification.** An estoppel arising from a deed may be avoided by showing a subsequent modification of the instrument by consent of the parties.<sup>212</sup>

(c) **Validity.** An invalid deed does not create an estoppel;<sup>213</sup> and if a deed is invalid as a conveyance, a covenant for

<sup>208</sup> McDougald v. Dougherty, 11 Ga. 570.

Accordingly, the debtor is not estopped by the deed from asserting an after-acquired title to the property. Emerson v. Sansome, 41 Cal. 552; Flenner v. Travelers' Ins. Co., 89 Ind. 164; Frey v. Ramsour, 66 N. C. 466. Nor is a judgment creditor estopped by the sheriff's deed from asserting a title subsequently acquired by him in the land sold on execution. Henderson v. Overton, 2 Yerg. (Tenn.) 394, 24 A. D. 492.

Privity between debtor and creditor and those claiming under them through a judicial sale, see page 532, *supra*.

<sup>209</sup> Nourse v. Nourse, 116 Mass. 101.

He may be estopped in pais from denying delivery, however, as against bona fide purchasers. Taylor v. Street, 82 Ga. 723, 5 L. R. A. 121.

<sup>210</sup> St. Louis, A. & T. H. R. Co. v. Belleville, 122 Ill. 376; Kidder v. Blaisdell, 45 Me. 461.

<sup>211</sup> Wark v. Willard, 13 N. H. 389.

It is otherwise in some states as to conveyances by married women. Jackson v. Torrence, 83 Cal. 521. See, also, page 540, *infra*.

<sup>212</sup> Fox v. Windes, 127 Mo. 502, 48 A. S. R. 648; Chloupek v. Perotka, 89 Wis. 551, 46 A. S. R. 858.

<sup>213</sup> Doe d. Preece v. Howells, 2 Barn. & Adol. 744; Kennedy v. McCartney's Heirs, 4 Port. (Ala.) 141, 158; McIntosh v. Parker, 82 Ala.

title therein does not, by the better opinion, create an estoppel.<sup>214</sup>

The fact that the grantor has received a discharge in bankruptcy after making the deed does not defeat an estoppel created by a covenant in it, and so permit the grantor to assert an after-acquired title.<sup>215</sup> Nor is the estoppel defeated

238; *Moses v. McClain*, 82 Ala. 370; *Shorman v. Eakin*, 47 Ark. 351; *Chase v. Cartright*, 53 Ark. 358, 22 A. S. R. 207; *Smith v. Penny*, 44 Cal. 161, 163, 165; *Caffrey v. Dudgeon*, 38 Ind. 512, 10 A. R. 126; *James v. Wilder*, 25 Minn. 305.

One who executes a deed despite a restraining order enjoining him from so doing is estopped from invalidating the deed for that cause. *Wilson v. Western N. C. Land Co.*, 77 N. C. 445.

*Capacity of parties.* A grantor may be estopped in pais from asserting that the grantee had no power to accept the grant. *Shawhan v. Long*, 26 Iowa, 488, 96 A. D. 164. Estoppel by deed of person non sui juris, see page 539, *infra*. Estoppel to deny capacity of corporation to accept deed, see § 157(b), *infra*. Estoppel of state by void grant, see page 541, *infra*.

*Estoppel by covenant or recital to assert non est factum or invalidity.* A recital in a bond does not estop the obligor from setting up that the bond is not his deed. *Singer Mfg. Co. v. Elizabeth*, 42 N. J. Law, 249. A recital in a statutory bond does not estop the obligor from showing that the bond is void because the conditions prescribed by statute have not been complied with. *Germond v. People*, 1 Hill (N. Y.) 343. If logs not subject to a lien are attached under color of the lien law, the owner, by giving the statutory bond to regain possession, does not estop himself to deny the lien. *Shevlin v. Whelen*, 41 Wis. 88. A covenant that a certain statutory prerequisite exists which is necessary to give validity to the deed does not preclude an inquiry into the truth of the matter. *Doe d. Chandler v. Ford*, 3 Adol. & E. 649.

<sup>214</sup> *Kercheval v. Triplett's Heirs*, 1 A. K. Marsh. (Ky.) 493; *Connor v. McMurray*, 2 Allen (Mass.) 202, 204; *Alt v. Banholzer*, 39 Minn. 511, 12 A. S. R. 681; *Adams v. Ross*, 30 N. J. Law, 505, 82 A. D. 237; *Chamberlain v. Spargur*, 86 N. Y. 603. *Contra*, *Brown v. Manter*, 21 N. H. 528, 53 A. D. 223; *Long Island R. Co. v. Conklin*, 29 N. Y. 572; *Shaw v. Galbraith*, 7 Pa. 111.

So, if the deed is inoperative, a recital in it cannot work an estoppel. *Conant v. Newton*, 126 Mass. 105; *Wallace's Lessee v. Miner*, 6 Ohio, 366.

<sup>215</sup> *Bush v. Person*, 18 How. (U. S.) 82; *Stewart v. Anderson*, 10 Ala.

by the fact that an action on the covenant has become barred by limitations.<sup>216</sup>

If a deed is valid as to one of several grantors, it may estop him, though it is void as to the others.<sup>217</sup> So, a deed that is valid as between the parties may estop the grantor, although it is void as to third persons.<sup>218</sup>

— **Fraud and mistake.** A deed procured by fraud does not create an estoppel against the grantor.<sup>219</sup> If the fraud was perpetrated by the grantor himself, however, he is estopped by the deed.<sup>220</sup> Thus, a deed made for the purpose of defrauding third persons works an estoppel against the grantor,<sup>221</sup> so long as the conveyance stands unassailed by the persons defrauded.<sup>222</sup>

504; *Chamberlain v. Meeder*, 16 N. H. 381; *Gregory v. Peoples*, 80 Va. 355. And see *Gibbs v. Thayer*, 6 Cush. (Mass.) 30.

This applies also to sales of personal property. *Dorsey v. Gassaway*, 2 Har. & J. (Md.) 402, 3 A. D. 557.

However, if a mortgage is discharged by judicial sale, and the mortgagor is afterwards discharged in bankruptcy, his subsequent purchase of the premises does not revive the mortgage, and he is not estopped to assert his new title against the mortgagee. *Rauch v. Dech*, 116 Pa. 157, 2 A. S. R. 598.

<sup>216</sup> *Cole v. Raymond*, 9 Gray (Mass.) 217.

<sup>217</sup> *Chapman v. Abrahams*, 61 Ala. 108; *Doe d. Wellborn v. Finley*, 52 N. C. (7 Jones) 228.

A deed made by a person as guardian may estop him individually, although it is void as to the ward. *Wells v. Steckelberg*, 52 Neb. 597, 66 A. S. R. 529. So, a deed made by an agent individually in an attempt to execute a power of attorney may estop him, though it is not binding on the principal. *North v. Henneberry*, 44 Wis. 306.

<sup>218</sup> *Stockton v. Williams*, 1 Doug. (Mich.) 546.

<sup>219</sup> *Bigelow, Estop.* (5th Ed.) 352.

The grantor's negligence may create an estoppel in pais precluding him from asserting the fraud, however. *McNell v. Jordan*, 28 Kan. 7; *Charleston v. Ryan*, 22 S. C. 339, 53 A. R. 713. The grantor may likewise be estopped to assert forgery. *Blaisdell v. Leach*, 101 Cal. 405, 40 A. S. R. 65.

<sup>220</sup> *Smith v. Ingram*, 130 N. C. 100, 61 L. R. A. 878.

A deed which is void for mistake does not create an estoppel,<sup>223</sup> and, in equity at least, a recital founded on mistake is not binding.<sup>224</sup>

— **Parties under disability.** A person non sui juris is not estopped by his deed. A deed made by an infant, for example, does not estop him<sup>225</sup> during his infancy; nor afterwards, if he disaffirms it.

The rule is the same at common law with reference to married women,<sup>226</sup> except in regard to their equitable separate

<sup>221</sup> *Glover v. Walker*, 107 Ala. 540; *Bush v. Rogan*, 65 Ga. 320, 38 A. R. 785; *Peterson v. Brown*, 17 Nev. 172, 45 A. R. 437.

<sup>222</sup> *Cox v. Wilder*, 2 Dill. 45, Fed. Cas. No. 3,308; *Kennedy v. First Nat. Bank*, 107 Ala. 170; *Lockett's Adm'r v. James*, 8 Bush (Ky.) 28; *Robinson v. Bates*, 3 Metc. (Mass.) 40; *Horton v. Kelly*, 40 Minn. 193; *Sears v. Hanks*, 14 Ohio St. 298, 84 A. D. 378.

<sup>223</sup> See *Gjerstadengen v. Hartzell*, 9 N. D. 268, 81 A. S. R. 575.

<sup>224</sup> *Brooke v. Haymes*, L. R. 6 Eq. 25; *Bower v. McCormick*, 23 Grat. (Va.) 310.

<sup>225</sup> *Cook v. Toumbs*, 36 Miss. 685; *Houston v. Turk*, 7 Yerg. (Tenn.) 13.

So, if a deed provides that the grantee shall have no power to dispose of the property before reaching a certain age, the grantee is not estopped by a deed executed by him before reaching the age specified; nor is there any estoppel on one claiming under him by a deed made after he has arrived at that age. *Dougal v. Fryer*, 3 Mo. 40, 22 A. D. 458. See, however, *McWilliams v. Nisly*, 2 Serg. & R. (Pa.) 507, 7 A. D. 654.

Generally speaking, the executed contracts of an infant are valid and operative until disaffirmed, while his executory contracts are invalid unless he ratifies them after he attains his majority. His deed of conveyance therefore passes title, subject to defeat only by a disaffirmance of the conveyance when he arrives at full age. And if, when he reaches his majority, he wishes to avoid the deed, he must do so within a reasonable time. *Hammon*, Cont. §§ 171, 175a. It would seem, therefore, that if a person makes a deed in infancy, and does not take means to disaffirm it within a reasonable time after reaching majority, it binds him by estoppel.

<sup>226</sup> *Bank of America v. Banks*, 101 U. S. 240; *Wood v. Terry*, 30 Ark. 385; *Henry v. Sneed*, 99 Mo. 407, 17 A. S. R. 580; *Den d. Hopper v. Demarest*, 21 N. J. Law, 525.



estate.<sup>227</sup> The protection of this rule does not extend to a release of the right of dower, however. By that, a married woman is estopped subsequently to assert the right.<sup>228</sup> But she is estopped no further than this. By joining the husband in a warranty deed of his land for the purpose of releasing her inchoate right of dower, the wife is not estopped, even in those jurisdictions where her disabilities have been removed by statute, from asserting a title afterwards acquired from another source.<sup>229</sup>

Modern statutes enlarging the power of a married woman in regard to conveyancing have to the same extent enlarged her liability by estoppel by deed.<sup>230</sup> If, however, a statute al-

<sup>227</sup> *Jones v. Reese*, 65 Ala. 134; *Nash v. Spofford*, 10 Metc. (Mass.) 192, 43 A. D. 425; *Powell's Appeal*, 98 Pa. 403, 413.

While a married woman may convey her lands by joining with her husband in a deed, and thus estop herself and her heirs from setting up against the grantee any title she may have had when the deed was made, yet her covenant of warranty in the deed does not estop her from setting up an after-acquired title. *Wadleigh v. Glines*, 6 N. H. 17, 23 A. D. 705; *Martin v. Dwelly*, 6 Wend. (N. Y.) 9, 21 A. D. 245. Some cases hold the contrary as to asserting an after-acquired title. *King v. Rea*, 56 Ind. 1; *Massie v. Sebastian*, 4 Bibb (Ky.) 433. And see *Fletcher v. Coleman*, 2 Head (Tenn.) 383, 388.

<sup>228</sup> *Usher v. Richardson*, 29 Me. 415; *Stearns v. Swift*, 8 Pick. (Mass.) 532. And see *Smith v. Oglesby*, 33 S. C. 194.

To estop her from claiming dower, she must release it. Merely joining in her husband's deed does not preclude her. *Powell v. Monson & B. Mfg. Co.*, 3 Mason, 347, Fed. Cas. No. 11,356; *Lothrop v. Foster*, 51 Me. 367; *Lufkin v. Curtis*, 13 Mass. 223.

<sup>229</sup> *Threefoot v. Hillman*, 130 Ala. 244, 89 A. S. R. 39; *Gonzales v. Hukil*, 49 Ala. 260, 20 A. R. 282; *Jefferson v. Edrington*, 53 Ark. 545; *Sanford v. Kane*, 133 Ill. 199, 23 A. S. R. 602; *Miller v. Miller*, 140 Ind. 174; *Childs v. McChesney*, 20 Iowa, 431, 89 A. D. 545; *Griffin v. Sheffield*, 38 Miss. 359, 77 A. D. 646; *Burston v. Jackson*, 9 Or. 275; *Tyler v. Moore* (Pa.) 17 Atl. 216. And see *Trentman v. Eldridge*, 98 Ind. 525; *Goodenough v. Fellows*, 53 Vt. 102.

<sup>230</sup> *Yerkes v. Hadley*, 5 Dak. 324, 2 L. R. A. 363; *Guertin v. Mombleau*, 144 Ill. 32; *King v. Rea*, 56 Ind. 1, 17; *Knight v. Thayer*, 125

allows a married woman to make conveyances only in a specified mode or for a specified purpose, a deed which does not comply with the prescribed requirements, or which is given for any other purpose, does not work an estoppel.<sup>231</sup>

It has been held that a corporation is not estopped by a deed which it had no power to make.<sup>232</sup>

By the better opinion, the state may be estopped by deed, the same as an individual.<sup>233</sup>

**(d) Construction—Truth appearing on face of deed.** When a deed is put forward as working an estoppel, there is often a preliminary question as to the meaning and effect of the instrument. If it is asserted that the deed estops the grantor to assert a derogatory right or title, it is necessary to ascertain what right or title the deed purports to convey. If an estoppel

Mass. 25; *Sandwich Mfg. Co. v. Zelmer*, 48 Minn. 408; *Zimmerman v. Robinson*, 114 N. C. 39; *Graham v. Meek*, 1 Or. 325.

<sup>231</sup> *Harden v. Darwin*, 77 Ala. 472; *Levering v. Shockey*, 100 Ind. 558; *Louisville, etc., R. Co. v. Stephens*, 96 Ky. 401, 49 A. S. R. 303; *Bohannon v. Travis*, 94 Ky. 59; *Merriam v. Boston, C. & F. R. Co.*, 117 Mass. 241; *Naylor v. Minock*, 96 Mich. 182, 35 A. S. R. 595; *Smith v. Ingram*, 132 N. C. 959, 95 A. S. R. 680.

<sup>232</sup> *In re Companies Acts*, 21 Q. B. Div. 301.

The same is true of a deed made by municipal officers in excess of their statutory powers. *Fairtitle v. Gilbert*, 2 Term R. 169. And see § 152(b), *supra*.

<sup>233</sup> *Branson v. Wirth*, 17 Wall. (U. S.) 32, 42 (semble); *State v. Brewer*, 64 Ala. 287 (semble); *Com. v. Andres' Heirs*, 3 Pick. (Mass.) 224; *St. Paul, S & T. F. R. Co. v. St. P. & P. R. Co.*, 26 Minn. 31, 34; *Heyward v. Farmers' Min. Co.*, 42 S. C. 138, 46 A. S. R. 702, 717. And see *Nieto's Heirs v. Carpenter*, 7 Cal. 527.

Some cases hold the contrary. *Doe d. Taylor v. Shufford*, 11 N. C. (4 Hawks) 116, 15 A. D. 512. The doctrine of estoppel does not apply to the state, so as to pass an after-acquired title. *Casey's Lessee v. Inloes*, 1 Gill (Md.) 430, 39 A. D. 658. The state can be estopped from asserting its right to its property only by legislative enactment or resolution. *Alexander v. State*, 56 Ga. 478. Where the sovereign is not bound, his assignee is not. *Doe d. Wallace v. Maxwell*, 32 N. C. (10 Ired.) 110, 51 A. D. 380.

is asserted to arise from given covenants or recitals, it is necessary to determine their meaning and extent. These questions are solved by resort to recognized rules of construction, which are not peculiarly related to the law of estoppel. It is sufficient here to mention one only,—that a deed upon which an estoppel is predicated must, as in other cases of contested meaning and effect, be construed as a whole. Each provision is to be interpreted with reference to the others. Particular expressions are not controlling if the evident intention of the parties, as gathered from the entire writing, runs to the contrary.<sup>234</sup> It is perhaps an indirect expression of this rule of construction to say, as is sometimes said,<sup>235</sup> that there is no estoppel if the truth appears on the face of the deed.

**§ 155. Estoppel against estoppel.**

Estoppel against estoppel commonly sets the matter at large.<sup>236</sup> Thus, if both parties claim under the same person,

<sup>234</sup> Bigelow, *Estop.* (5th Ed.) 362; Hammon, *Cont.* § 401; *Doe d. McGill v. Shea*, 2 U. C. Q. B. 483, 486; *Bower v. McCormick*, 23 Grat. (Va.) 310.

<sup>235</sup> *Pelletreau v. Jackson*, 11 Wend. (N. Y.) 110, 118.

This doctrine does not prevail in England. *Morton v. Woods*, L. R. 4 Q. B. 293, 303.

"Whether the appearance of the truth on the face of the instrument will defeat an estoppel or not must altogether depend upon the fact whether it is so expressed that it can be readily seen and understood by the person who ought to be influenced by it, or in manner so technical or obscure that although it must be admitted it appears in the instrument, yet it is certain it was not seen nor understood by the person who should have been influenced by it, but that he dealt with the party sought to be estopped as though the words on which the estoppel is founded expressed the whole truth." *Hannon v. Christopher*, 34 N. J. Eq. 459, 465.

<sup>236</sup> *Hoboken v. Pa. R. Co.*, 124 U. S. 656, 693; *Branson v. Wirth*, 17 Wall. (U. S.) 32, 42; *Doe d. Taylor v. Shufford*, 11 N. C. (4 Hawks) 116, 15 A. D. 512, 515. See *Brown v. Staples*, 28 Me. 497, 48 A. D. 504; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 A. D. 189, 200.

and one is estopped by one deed, and the other is estopped by another deed, both made by that person, one estoppel offsets the other, and the right of the parties must be adjusted without regard to any estoppel.<sup>237</sup> If, however, upon a conveyance of lands with covenants for title, the grantee gives back a mortgage or trust deed with like covenants to secure the price, he is not estopped by his covenants from asserting a breach on the part of his grantor.<sup>238</sup>

#### ART. IV. ESTOPPEL BY CONTRACT.

General considerations, § 156.

Facts settled by contract, § 157.

- (a) General rule.
- (b) Existence and power of corporation.
- (c) Intention of parties.

Acts done under contract—Possession, § 158.

- (a) Grantor and grantee.
- (b) Vendor and purchaser.
- (c) Landlord and tenant.
- (d) Bailor and bailee.

#### § 156. General considerations.

There are two forms of estoppel by contract, viz.: (1) Estoppel to deny facts agreed upon or assumed to exist as the basis of the contract; and (2) estoppel arising from acts done in performance of the contract. The first form, though sometimes classified as such, is not, in strict propriety, a species of estoppel in pais. It is analogous to estoppel by deed, and the principle which dominates it is perhaps the same. The second form of estoppel by contract arises, not from the writing alone, but from acts done in performance of the contract. It therefore is a species of estoppel in pais.

<sup>237</sup> *Carpenter v. Thompson*, 3 N. H. 204, 14 A. D. 348.

<sup>238</sup> *Sumner v. Barnard*, 12 Metc. (Mass.) 459; *Resser v. Carney*, 52 Minn. 397; *Connor v. Eddy*, 25 Mo. 72; *Haynes v. Stevens*, 11 N. H. 28.

Estoppel by contract, it should be observed, does not include cases of estoppel not arising by or by virtue of the contract itself, though arising in the course of the contract. If the estoppel is no part of the contract itself, or of its legal effect, it belongs to estoppel by misrepresentation, express or implied.<sup>239</sup>

This species of estoppel presupposes the existence of a valid contract. An illegal contract does not create an estoppel.<sup>240</sup>

Cases are to be found wherein it is said that an instrument not under seal cannot of itself create an estoppel similar to that created by deed.<sup>241</sup> In reason, however, this dictum has no foundation, and, by the weight of authority, it is repudiated.<sup>242</sup> In those jurisdictions wherein private seals have been abolished, an unsealed writing may create an estoppel of the same nature as estoppel by deed.<sup>243</sup>

<sup>239</sup> Bigelow, *Estop.* (5th Ed.) 455.

<sup>240</sup> *Dupas v. Wassell*, 1 Dill. 213, Fed. Cas. No. 4,182; *Shorman v. Eakin*, 47 Ark. 351; *Langan v. Sankey*, 55 Iowa, 52; *Tate v. Commercial Bldg. Ass'n*, 97 Va. 74, 75 A. S. R. 770.

<sup>241</sup> *Shelton v. Alcox*, 11 Conn. 239, 249; *Davis v. Tyler*, 18 Johns. (N. Y.) 490.

<sup>242</sup> *Carpenter v. Buller*, 8 Mees. & W. 209, 212.

In a certain aspect, indeed, the principle of estoppel is a substantive part of the law of contract. If a person so speaks or acts as to lead a reasonable man to believe that he makes or assents to a particular proposition, it constitutes in law an offer or an acceptance, as the case may be, and a contract may result in spite of any mental reservation or secret dissent. *Holland, Jur.* 228-234; *Hammon, Cont.* pp. 8, 58, 100, 106, 110, 120. So, if a man, in entering into an apparent agreement, uses words which express a meaning different from his actual intent, a contract ordinarily arises in spite of that difference. Having the power to choose his words, he is held to the true meaning of those he adopts. *Hammon, Cont.* pp. 783, 813. In each case he is bound by the principle which dominates the law of estoppel, supplemented sometimes by a rule of interpretation or construction. 2 *Mich. Law Rev.* 106.

<sup>243</sup> *Jones v. Morris*, 61 Ala. 518.

§ 157. **Facts settled by contract.**

(a) **General rule.** If, in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands.<sup>244</sup> If, for example, a person enters into a contract in a representative capacity, and the contract is made on that basis, both parties are estopped to deny that he occupied that position or sustained that character.<sup>245</sup>

(b) **Existence and power of corporation.** Important illustrations of this principle occur in the law of corporations. A body assuming to enter into a contract as a corporation is estopped to assert any defect in its organization for the purpose of escaping liability to the other party to the contract, where he had no notice of the defect when the contract was made.<sup>246</sup> So, one who enters into a contract with a *de facto* corporation is ordinarily estopped to attack its legal existence for the purpose of avoiding the effect of the contract,<sup>247</sup> un-

<sup>244</sup> *Fourth Nat. Bank v. Olney*, 63 Mich. 58; *Delaney v. Dutcher*, 23 Minn. 373; *Hoeger v. Chicago, M. & St. P. R. Co.*, 63 Wis. 100, 53 A. R. 271.

<sup>245</sup> *Hill v. Huckabee*, 52 Ala. 155; *Du Val v. Marshall*, 30 Ark. 230. See, also, *State v. Stone*, 40 Iowa, 547; *State v. Spaulding*, 24 Kan. 1.

<sup>246</sup> *Dooley v. Cheshire Glass Co.*, 15 Gray (Mass.) 494; *Attorney General v. Simonton*, 78 N. C. 57. *Contra*, *Boyce v. Towsontown Station*, 46 Md. 359.

The stockholders are likewise estopped when sued upon their individual liability. *McCarthy v. Lavasche*, 89 Ill. 270, 31 A. R. 83; *Hagerman v. Ohio Bldg. & Sav. Ass'n*, 25 Ohio St. 186.

<sup>247</sup> *Close v. Glenwood Cemetery*, 107 U. S. 466, 477; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 90 A. S. R. 907; *Camp v. Land*, 122 Cal. 167; *Booske v. Gulf Ice Co.*, 24 Fla. 550; *Imboden v. Etowah & B. B. H. H. Min. Co.*, 70 Ga. 86; *McLaughlin v. Citizens' Bldg., L. & Sav. Ass'n*, 62 Ind. 264; *Franklin v. Twogood*, 18 Iowa, 515; *Massey v. Citizens' Bldg. & Sav. Ass'n*, 22 Kan. 624; *Osgood v. Abbott*, 58 Me. 73; *Butchers' & D. Bank v. McDonald*, 130 Mass. 264; *Estey Mfg. Co. v. Runnels*, 55 Mich. 130; *Bradley v. Reppell*, 133 Mo. 545, 54 A. S. R. 685, 688

Hammon, Ev.—85.

less there was fraud in securing recognition as a corporation.<sup>248</sup>

The courts do not agree as to the effect of an ultra vires contract with a corporation, and therefore it is not possible to formulate a general rule which will apply in all jurisdictions. The following has been given as a summary of the decisions:<sup>249</sup> First. If the contract is fully executed on both sides, the courts will not interfere to deprive either party of what has been acquired under it.<sup>250</sup> Second. If the contract is executory on both sides, it is void, and, as a rule, neither party can maintain an action, either for specific performance or to recover damages for nonperformance;<sup>251</sup> and this rule ap-

(semble). See, however, *Duke v. Taylor*, 37 Fla. 64, 53 A. S. R. 232; *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 480, 24 A. D. 51.

It has been held that the estoppel does not arise where the person who dealt with the corporation seeks to charge its members as partners. In *re Mendenhall*, 9 N. B. R. 497, Fed. Cas. No. 9,425; *Williams v. Hewitt*, 47 La. Ann. 1076, 49 A. S. R. 394; *Glenn v. Bergmann*, 20 Mo. App. 343. *Contra*, *Snider Sons' Co. v. Troy*, 91 Ala. 224, 24 A. S. R. 887; *Kleckner v. Turk*, 45 Neb. 176.

The estoppel cannot be urged unless there was a corporation de facto. *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 52 A. S. R. 220; *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593, 72 A. S. R. 326.

<sup>248</sup> *Bigelow, Estop.* (5th Ed.) 463, 464; *Doyle v. Mizner*, 42 Mich. 332.

<sup>249</sup> *Marshall, Corp.* §§ 83-92.

<sup>250</sup> *First Nat. Bank v. Stewart*, 107 U. S. 676; *Long v. Ga. Pac. R. Co.*, 91 Ala. 519, 24 A. S. R. 931; *Hough v. Cook County Land Co.*, 73 Ill. 23, 24 A. R. 230; *Holmes & G. Mfg. Co. v. Holmes & W. M. Co.*, 127 N. Y. 252, 24 A. S. R. 448; *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313; *Fayette Land Co. v. Louisville & N. R. Co.*, 93 Va. 274.

<sup>251</sup> *Ashbury, R. C. & I. Co. v. Riche*, L. R. 7 H. L. 653; *Central Transp. Co. v. Pullman's P. Car Co.*, 139 U. S. 24; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 A. S. R. 203; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 A. R. 221; *Day v. Spiral S. B. Co.*, 57 Mich. 146, 58 A. R. 352; *Downing v. Mount Wash. R. Co.*, 40 N. H. 230; *Nassau Bank v. Jones*, 95 N. Y. 115, 47 A. R. 14; *Coppin v. Greenlees & R. Co.*, 38 Ohio St. 275, 43 A. R. 425; *Northwestern U. P. Co. v. Shaw*, 37 Wis. 655, 19 A. R. 781.

plies, notwithstanding the contract has been partly performed on both sides.<sup>252</sup> Third. Where the contract is executory on one side only, and has been fully executed on the other, so that one of the parties has furnished the consideration, in money, property, or services, for the promise of the other, the courts differ as to whether an action will lie on the contract by the party thus furnishing the consideration. (a) Some courts hold that the express contract is void, and that no action will lie upon it, the remedy, if any, being quasi ex contractu for what has been received under the contract.<sup>253</sup> (b) Other courts hold that the party thus receiving the consideration is estopped to set up that the contract is ultra vires, in order to defeat an action on the contract.<sup>254</sup> Fourth. When either of the parties to an ultra vires contract has received money or property under the same, it must be restored on repudiating the contract;<sup>255</sup> and therefore, (a) when one of the parties repudiates an ultra vires contract after receiving

<sup>252</sup> *Ashbury, R. C. & I. Co. v. Riche*, L. R. 7 H. L. 653; *Thomas v. West Jersey R. Co.*, 101 U. S. 71; *Day v. Spiral S. B. Co.*, 57 Mich. 146, 58 A. R. 352; *Mallory v. Hanaur Oil Works*, 86 Tenn. 598.

<sup>253</sup> *Ashbury, R. C. & I. Co. v. Riche*, L. R. 7 H. L. 653; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24; *Sherwood v. Alvis*, 83 Ala. 115, 3 A. S. R. 695; *Best Brew. Co. v. Klassen*, 185 Ill. 37, 76 A. S. R. 26; *Brunswick Gas Light Co. v. United Gas, F. & L. Co.*, 85 Me. 532, 35 A. S. R. 385; *Davis v. Old Colony R. Co.*, 131 Mass. 258, 41 A. R. 221; *Downing v. Mount Wash. R. Co.*, 40 N. H. 230; *Buckeye Marble & F. Co. v. Harvey*, 92 Tenn. 115, 36 A. S. R. 71; *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 A. R. 781.

<sup>254</sup> *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 11, 59 A. R. 134; *State Board v. Citizens' St. R. Co.*, 47 Ind. 407, 17 A. R. 702; *Day v. Spiral S. B. Co.*, 57 Mich. 146, 58 A. R. 352; *Camden & A. R. Co. v. May's L. & E. H. C. R. Co.*, 48 N. J. Law, 530; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 A. R. 504; *Wright v. Pipe Line Co.*, 101 Pa. 204, 47 A. R. 701; *Bond v. Terrell C. & W. Mfg. Co.*, 82 Tex. 309. See, however, *Hubbard v. Haley*, 96 Wis. 578.

<sup>255</sup> *Manchester & L. R. Co. v. Concord R. Co.*, 66 N. H. 100, 49 A. S. R. 582.



money, property, or services under it, the other party may maintain an action on implied or quasi contract to recover the money or the value of the property or services.<sup>256</sup> (b) In a proper case he may have an accounting in equity.<sup>257</sup> (c) Restoration of the money or property will be required in equity before granting relief by way of rescission.<sup>258</sup> Fifth. A corporation is liable on a contract which is apparently within its powers, although it is rendered ultra vires by reason of extrinsic facts, if such facts were not within the knowledge of the other party.<sup>259</sup> So, if a corporation has the power, under some circumstances, to become a party to negotiable instruments, and it does so for an unauthorized purpose, it cannot set up the defense of ultra vires as against a bona fide purchaser for value.<sup>260</sup> Sixth. If a contract is ultra vires in part only, the part which is authorized may be enforced if it can be separated from the part which is unauthorized.<sup>261</sup> Seventh.

<sup>256</sup> *Morville v. American T. Soc.*, 123 Mass. 129, 25 A. R. 40; *Day v. Spiral S. B. Co.*, 57 Mich. 146, 58 A. R. 352; *Northwestern U. P. Co. v. Shaw*, 37 Wis. 655, 19 A. R. 781. See, however, *Valley R. Co. v. Lake Erie I. Co.*, 46 Ohio St. 44.

<sup>257</sup> *Cent. Trust Co. v. Ohio Cent. R. Co.*, 23 Fed. 306; *Manchester & L. R. Co. v. Concord R. Co.*, 66 N. H. 100, 49 A. S. R. 582; *Boyd v. American Carbon Black Co.*, 182 Pa. 206; *Moore v. Swanton Tan. Co.*, 60 Vt. 459.

<sup>258</sup> *Wilson's Case*, L. R. 12 Eq. 521; *American Union Tel. Co. v. Union Pac. R. Co.*, 1 McCrary, 188, 1 Fed. 745.

<sup>259</sup> *Credit Co. v. Howe Mach. Co.*, 54 Conn. 357, 1 A. S. R. 123; *Lucas v. White Line Trans. Co.*, 70 Iowa, 541, 59 A. R. 449; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 3 A. R. 322; *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291, 41 A. R. 285.

<sup>260</sup> *Wood v. Corry Water-Works Co.*, 44 Fed. 146; *Nat. Bank v. Young*, 41 N. J. Eq. 531; *Wright v. Pipe Line Co.*, 101 Pa. 204, 47 A. R. 701.

<sup>261</sup> *Kan. Val. Nat. Bank v. Rowell*, 2 Dill. 371, Fed. Cas. No. 7,611; *Ill. Trust & Sav. Bank v. Pac. R. Co.*, 117 Cal. 332; *Hendee v. Pinkerton*, 14 Allen (Mass.) 381; *Phila. & S. R. Co. v. Lewis*, 33 Pa. 33, 75 A. D. 574.

A corporation may set up the defense of ultra vires when sued on a contract entered into by it as agent for an undisclosed principal.<sup>262</sup>

(c) **Intention of parties.** Whether a fact is settled by a contract so as to preclude evidence in denial of it is a question depending, as a rule, upon the intention of the parties.<sup>263</sup> An estoppel does not arise from a recital in a simple contract unless it appears that it is of the essence of the contract.<sup>264</sup> An acknowledgment of the receipt of money or property, for example, is not generally construed as settling the actual receipt of it so as to preclude evidence to the contrary.<sup>265</sup>

§ 158. Acts done under contract—Possession.

(a) **Grantor and grantee.** A grantee who takes possession

<sup>262</sup> *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135, 19 A. S. R. 432.

<sup>263</sup> *Bigelow, Estop.* (5th Ed.) 460.

<sup>264</sup> See *Ferguson v. Millikin*, 42 Mich. 441.

<sup>265</sup> *Farrar v. Hutchinson*, 9 Adol. & E. 641; *Tucker v. Baldwin*, 13 Conn. 136, 33 A. D. 384; *Lapping v. Duffy*, 65 Ind. 229; *Pitt v. Berkshire Life Ins. Co.*, 100 Mass. 500, 504; *Ensign v. Webster*, 1 Johns. Cas. (N. Y.) 145, 1 A. D. 108; *Megargel's Adm'r v. Megargel*, 105 Pa. 475. And see *Van Ness v. Hadsell*, 54 Mich. 560; *Marco v. Fond du Lac County*, 63 Wis. 212. See, however, *Teutonia Life Ins. Co. v. Anderson*, 77 Ill. 384.

It has been held that while an acknowledgment of receipt, as part of the contract in which it occurs, may not be contradicted for the purpose of defeating the operation of the contract, yet it may, as a simple receipt, be contradicted for collateral purposes, such as, for example, the purpose of recovering the money receipted for. *Bigelow, Estop.* (5th Ed.) 471, note 2.

The party making the acknowledgment may be estopped in pais, by extraneous circumstances, to deny the receipt as against third persons who have acted on it to their detriment. *Bickerton v. Walker*, 31 Ch. Div. 151; *McNeill v. Hill*, Woolw. 96, Fed. Cas. No. 8,914; *Armour v. Mich. Cent. R. Co.*, 65 N. Y. 111, 22 A. R. 603; *Hale v. Mil. Dock Co.*, 29 Wis. 482, 9 A. R. 603. And an estoppel in pais may arise from extraneous circumstances, even as between the parties to the acknowledgment. *Dresbach v. Minnis*, 45 Cal. 223; *Staples v. Fill-*

under an absolute conveyance is not therefore estopped to deny his grantor's title.<sup>266</sup> While in peaceable possession under the deed, however, he cannot dispute his grantor's title for the purpose of avoiding payment of the purchase money.<sup>267</sup>

(b) **Vendor and purchaser.** A purchaser of land in peaceable possession under a contract of purchase is ordinarily estopped to deny his vendor's title.<sup>268</sup> If, however, at the time

more, 43 Conn. 510; *Dewey v. Fields*, 4 Metc. (Mass.) 381, 38 A. D. 376; *Dezell v. Odell*, 3 Hill (N. Y.) 215, 38 A. D. 628; *Bell v. Schafer*, 58 Wis. 223.

Effect of acknowledgment of receipt of consideration for deed, see page 527, *supra*.

<sup>266</sup> *Bybee v. Or. & Cal. R. Co.*, 139 U. S. 663; *San Francisco v. Lawton*, 18 Cal. 465, 79 A. D. 187; *Cobb v. Oldfield*, 151 Ill. 540, 42 A. S. R. 263; *Whitmire v. Wright*, 22 S. C. 446, 53 A. R. 724.

The grantee cannot deny his grantor's title, however, for the purpose of defeating a recovery by the latter upon the grantee's breach of condition subsequent. *O'Brien v. Wetherell*, 14 Kan. 616.

A mortgagor is estopped from denying the mortgagee's title. *Farris v. Houston*, 74 Ala. 162. See, however, *Bush v. White*, 85 Mo. 339.

A trustee is estopped to set up a title adverse to the trust. *Willison v. Watkins*, 3 Pet. (U. S.) 43, 48; *Benjamin v. Gill*, 45 Ga. 110; *Dawson v. Mayall*, 45 Minn. 408. The same rule applies against executors and administrators. *Irly v. Kitchell*, 42 Ala. 438; *Smith v. Sutton*, 74 Ga. 528; *White v. Swain*, 3 Pick. (Mass.) 365. It applies, also, against guardians. *Burke v. Turner*, 90 N. C. 588.

Privity between grantor and grantee, see § 153(b), *supra*.

<sup>267</sup> *Robertson v. Pickrell*, 109 U. S. 608, 615; *Strong v. Waddell*, 56 Ala. 471; *Bramble v. Beldler*, 38 Ark. 200; *Marsh v. Thompson*, 102 Ind. 272; *Crumb v. Wright*, 97 Mo. 13; *Smith v. Loafman*, 145 Pa. 628; *Spinning v. Drake*, 4 Wash. 285.

<sup>268</sup> *Lake v. Hancock*, 38 Fla. 53, 56 A. S. R. 159; *Harle v. McCoy*, 7 J. J. Marsh. (Ky.) 318, 23 A. D. 407; *Towne v. Butterfield*, 97 Mass. 105; *Sayles v. Smith*, 12 Wend. (N. Y.) 57, 27 A. D. 117; *Lacy v. Johnson*, 58 Wis. 414. See, however, *Baker v. Hale*, 6 Baxt. (Tenn.) 46.

If, however, the vendor parts with title to a third person, and then sues for the land, the purchaser may show this in defense. *Beall v. Davenport*, 48 Ga. 165, 15 A. R. 656; *Dobson v. Culpepper*, 23 Grat. (Va.) 352. And if the purchaser has surrendered possession, he may then dispute the vendor's title. *Smith v. Babcock*, 36 N. Y. 167, 93 A. D. 498, 500.

the contract was made, he was already in possession under a claim of title, he is not estopped to dispute the title of his vendor;<sup>269</sup> and he may buy in an outstanding title and assert it against the vendor.<sup>270</sup>

(c) **Landlord and tenant.** A tenant in possession under a lease, express or implied, is estopped to deny his landlord's title.<sup>271</sup> However, the tenant is not estopped to show that the landlord's title has expired since the entry was made;<sup>272</sup> and he may purchase the landlord's title and assert it against the

<sup>269</sup> *Donahue v. Klassner*, 22 Mich. 252; *Greene v. Couse*, 127 N. Y. 386, 24 A. S. R. 458. *Contra*, *McMath v. Teel*, 64 Ga. 595; *Pershing v. Canfield*, 70 Mo. 140.

<sup>270</sup> *Green v. Dietrich*, 114 Ill. 636.

<sup>271</sup> *Morton v. Woods*, L. R. 3 Q. B. 658; *Robertson v. Pickrell*, 109 U. S. 608, 614; *Davis v. Williams*, 130 Ala. 530, 89 A. S. R. 55, and exhaustive note; *Burgess v. Rice*, 74 Cal. 590; *Heisen v. Heisen*, 145 Ill. 658; *George v. Putney*, 4 Cush. (Mass.) 351, 50 A. D. 788; *Nims v. Sherman*, 43 Mich. 45; *Winston v. Franklin Academy*, 28 Miss. 118, 61 A. D. 540; *Carson v. Broady*, 56 Neb. 648, 71 A. S. R. 691; *Territt v. Cowenhoven*, 79 N. Y. 400; *Alexander v. Gibbon*, 118 N. C. 796, 54 A. S. R. 757.

The once-prevailing rule that the estoppel rests upon the existence of a sealed lease is obsolete. Enjoyment of the land by permission is the foundation of the estoppel. *Bigelow, Estop.* 506-512,

The estoppel binds the tenant's privies also. *Doe d. Bullen v. Mills*, 2 Adol. & E. 17; *Barwick v. Thompson*, 7 Term R. 488; *Springs v. Schenck*, 99 N. C. 551, 6 A. S. R. 552; *Stewart v. Roderick*, 4 Watts & S. (Pa.) 188, 39 A. D. 71. Husband and wife are not necessarily in privity. *Shew v. Call*, 119 N. C. 450, 56 A. S. R. 678.

A mere licensee, also, is estopped to deny the licensor's title. *Doe d. Johnson v. Baytup*, 3 Adol. & E. 188; *Glynn v. George*, 20 N. H. 114; *Wilson v. Maltby*, 59 N. Y. 126; *Dills v. Hampton*, 92 N. C. 565.

As to whether the bare taking of a lease of land of which the lessee is already in possession estops him from denying the lessor's title, the cases are in conflict. *Bigelow, Estop.* (5th Ed.) 527.

<sup>272</sup> *Hopcraft v. Keys*, 9 Bing. 613; *Otis v. McMillan*, 70 Ala. 46; *St. John v. Quitzow*, 72 Ill. 334; *Ryder v. Mansell*, 66 Me. 167; *Presstman v. Silljacks*, 52 Md. 647; *Emmes v. Feeley*, 132 Mass. 346.

latter.<sup>273</sup> Again, the tenant may, on the expiration of his lease, surrender possession, and then recover it back on a paramount title;<sup>274</sup> and if the tenant disclaims to hold under the landlord, to the latter's knowledge, his tenancy becomes adverse, and if the landlord fails to eject him within the period prescribed by law for the bringing of an action to recover real property, the tenant may thereafter assert the title so acquired by him.<sup>275</sup>

(d) **Bailor and bailee.** A bailee who takes possession as such is estopped to deny the bailor's title.<sup>276</sup>

#### ART. V. ESTOPPEL BY MISREPRESENTATION.

Preliminary considerations, § 159.

- (a) Rule of estoppel.
- (b) Pleading—Province of court and jury.
- (c) Estoppel to assert illegality.
- (d) Land titles—Statute of frauds.
- (e) Who may be estopped.

Requisites of estoppel, § 160.

- (a) Existence of misrepresentation.
- (b) Misrepresentation of third person.
- (c) Indirect misrepresentation.
- (d) Misrepresentation of opinion and intention.
- (e) Fraudulent intent.
- (f) Carelessness.

<sup>273</sup> *Tilghman v. Little*, 13 Ill. 239; *Nellis v. Lathrop*, 22 Wend. (N. Y.) 121, 34 A. D. 285.

He may also purchase a paramount title under which the landlord claims, and assert it against the latter. *Ford v. Ager*, 2 Hurl. & C. 279.

<sup>274</sup> *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 A. D. 189.

<sup>275</sup> *Willison v. Watkins*, 3 Pet. (U. S.) 43; *Sherman v. Champlain Transp. Co.*, 31 Vt. 162.

<sup>276</sup> *Osgood v. Nichols*, 5 Gray (Mass.) 420; *Sinclair v. Murphy*, 14 Mich. 392; *Pulliam v. Burlingame*, 81 Mo. 111, 51 A. R. 229. See, however, *Biddle v. Bond*, 34 L. J. Q. B. 137; *The Idaho*, 93 U. S. 575.

*Warehouseman.* *Stonard v. Dunkin*, 2 Camp. 344.

*Bank.* *Seneca County v. Allen*, 99 N. Y. 532; *First Nat. Bank v. Mason*, 95 Pa. 113, 40 A. R. 632.

- (g) Change of position—Reliance on misrepresentation—Injury.
- (h) Ground for anticipating change of position.

§ 159. Preliminary considerations.

(a) **Rule of estoppel.** If a man, by word or conduct, induces another to believe in the existence of a certain fact, and the other, in reliance thereon, changes his position to his prejudice, the former is ordinarily estopped, as against the latter, to assert that the fact does not exist.<sup>277</sup> The doctrine rests upon the inequity of permitting one to allege the nonexistence

<sup>277</sup> ENGLAND: *Skyring v. Greenwood*, 4 Barn. & C. 289.

ARKANSAS: *Graham v. Thompson*, 55 Ark. 296, 29 A. S. R. 40.

FLORIDA: *Terrell v. Weymouth*, 32 Fla. 255, 37 A. S. R. 94.

GEORGIA: *Ga. Pac. R. Co. v. Strickland*, 80 Ga. 776, 12 A. S. R. 282.

ILLINOIS: *Robinson Bank v. Miller*, 153 Ill. 244, 46 A. S. R. 883; *International Bank v. Bowen*, 80 Ill. 541.

INDIANA: *Musselman v. McElhenny*, 23 Ind. 4, 85 A. D. 445.

IOWA: *Holman v. Omaha & C. B. R. & B. Co.*, 117 Iowa, 268, 94 A. S. R. 293.

KANSAS: *Hutchinson & S. R. Co. v. Com'rs*, 48 Kan. 70, 30 A. S. R. 273; *Stewart v. Wyandotte County Com'rs*, 45 Kan. 708, 23 A. S. R. 746.

LOUISIANA: *Choppin v. Dauphin*, 48 La. Ann. 1217, 55 A. S. R. 313.

MAINE: *Casco Bank v. Keene*, 53 Me. 103.

MASSACHUSETTS: *Baker v. Seavey*, 163 Mass. 522, 47 A. S. R. 475.

MICHIGAN: *Sutton v. Beckwith*, 68 Mich. 303, 13 A. S. R. 344; *Robb v. Shephard*, 50 Mich. 189.

MINNESOTA: *Moffett v. Parker*, 71 Minn. 139, 70 A. S. R. 319; *Mankato v. Willard*, 13 Minn. 1, 97 A. D. 208.

NEW YORK: *Piper v. Hoad*, 107 N. Y. 73, 1 A. S. R. 789; *Continental Nat. Bank v. Nat. Bank*, 50 N. Y. 576.

NORTH CAROLINA: *Humphreys v. Finch*, 97 N. C. 303, 2 A. S. R. 293.

PENNSYLVANIA: *Redmond v. Excelsior S. F. & L. Ass'n*, 194 Pa. 643, 75 A. S. R. 714; *Green's Appeal*, 97 Pa. 342.

SOUTH CAROLINA: *Simmons Hardw. Co. v. Greenwood Bank*, 41 S. C. 177, 44 A. S. R. 700.

VIRGINIA: *Fidelity Ins., T. & S. D. Co. v. Shenandoah Valley R. Co.*, 86 Va. 1, 19 A. S. R. 858.

WISCONSIN: *Weisbrod v. Chicago & N. W. R. Co.*, 18 Wis. 35, 86 A. D. 743. See, generally, 7 Current Law, 1492.

of facts in whose existence he has, by his own word or conduct, induced another to believe to his prejudice.<sup>278</sup>

The principle of estoppel by misrepresentation is sometimes spoken of as a rule of evidence,<sup>279</sup> but it is not such. It is a rule of substantive law which precludes the person estopped from taking advantage of the nonexistence of facts in whose existence he has caused another to believe. Evidence of those facts is excluded solely because they are legally immaterial. Whether or not they exist, the rights of the parties are the same.

**(b) Pleading—Province of court and jury.** An estoppel by misrepresentation, when relied on as a cause of action or ground of defense, must be pleaded.<sup>280</sup>

The question whether the facts exist which are relied on as creating an estoppel is for the jury,<sup>281</sup> but the question whether the facts admitted or proved give rise to an estoppel is for the court.<sup>282</sup>

**(c) Estoppel to assert illegality.** Ordinarily, as between the parties, an illegal contract cannot become enforceable on the principle of estoppel.<sup>283</sup> A person may, however, be estopped

<sup>278</sup> *Gillett v. Wiley*, 126 Ill. 310, 9 A. S. R. 587; *Cook v. Walling*, 117 Ind. 9, 10 A. S. R. 17; *Hubbard v. Shepard*, 117 Mich. 25, 72 A. S. R. 548.

<sup>279</sup> *Low v. Bouverie* [1891] 3 Ch. 101, 60 Law J. Ch. 594; *Langdon v. Doud*, 10 Allen (Mass.) 433, 435; *Gaston v. Brandenburg*, 42 S. C. 348.

<sup>280</sup> *De Votie v. McGerr*, 15 Colo. 467, 22 A. S. R. 426; *State v. East Fifth St. R. Co.*, 140 Mo. 539, 62 A. S. R. 742; *Cockrill v. Hutchinson*, 135 Mo. 67, 58 A. S. R. 564. And see *Nickum v. Burckhardt*, 50 Or. 464, 60 A. S. R. 822.

In some states it must be pleaded in equity, but need not be at law. *Dean v. Crall*, 98 Mich. 591, 39 A. S. R. 571. See, also, 7 *Current Law*, 1507.

<sup>281</sup> *Gaylord v. Neb. S. & E. Bank*, 54 Neb. 104, 69 A. S. R. 705.

<sup>282</sup> *Wachter v. Phoenix Assur. Co.*, 132 Pa. 128, 19 A. S. R. 600.

<sup>283</sup> *Durkee v. People*, 155 Ill. 354, 46 A. S. R. 340; *Lynch v. Rosenthal*, 144 Ind. 86, 55 A. S. R. 168.

by misrepresentation from asserting illegality of consideration as a defense to a note or security in the hands of a bona fide purchaser.<sup>284</sup>

(d) **Land titles—Statute of frauds.** At law, in some states, a parol estoppel cannot divest one of the title to land. The person asserting it must resort to equity.<sup>285</sup> However, the statute of frauds does not prevent the acquisition of a right, title, or interest in lands by estoppel.<sup>286</sup>

(e) **Who may be estopped.** The state may not be estopped by unauthorized misrepresentation, express or implied, of its officers. The doctrine of estoppel does not apply against the sovereign.<sup>287</sup>

The doctrine of estoppel cannot ordinarily be invoked to defeat a municipal corporation in the prosecution of its public affairs because of an error or mistake of one of its agents or officers which has been relied upon by a third person to his detriment. The corporation is estopped, as a rule, only when it acts in its private, as distinguished from its public or governmental, capacity.<sup>288</sup>

<sup>284</sup> *Pritchett v. Aherns*, 26 Ind. App. 56, 84 A. S. R. 274; *Weyh v. Boylan*, 85 N. Y. 394, 39 A. R. 669; *Holman v. Boyce*, 65 Vt. 318, 36 A. S. R. 361.

<sup>285</sup> *Smith v. Mundy*, 18 Ala. 182, 52 A. D. 221; *Doe d. McPherson v. Walters*, 16 Ala. 714, 50 A. D. 200; *Mills v. Graves*, 38 Ill. 455, 87 A. D. 315. *Contra*, *Tracy v. Roberts*, 88 Me. 310, 51 A. S. R. 394.

<sup>286</sup> *Hoene v. Pollak*, 118 Ala. 617, 72 A. S. R. 189; *Ala. G. S. R. Co. v. South & N. A. R. Co.*, 84 Ala. 570, 5 A. S. R. 401; *Cross v. Weare Com. Co.*, 153 Ill. 499, 46 A. S. R. 902; *Mattes v. Frankel*, 157 N. Y. 603, 68 A. S. R. 304.

<sup>287</sup> *Pulaski County v. State*, 42 Ark. 118; *People v. Brown*, 67 Ill. 435; *Atty. Gen. v. Marr*, 55 Mich. 445. *Quære*, *Reid v. State*, 74 Ind. 252. *Contra*, *State v. Ober*, 34 La. Ann. 359; *State v. Taylor*, 28 La. Ann. 460. And see *Opinion of Sup. Ct.*, 49 Mo. 216; *Verdier v. Port Royal R. Co.*, 15 S. C. 476, 483.

<sup>288</sup> *Seeger v. Mueller*, 133 Ill. 86; *County Com'rs v. Nelson*, 51 Minn. 79, 38 A. S. R. 492; *State v. Murphy*, 134 Mo. 548, 56 A. S. R. 51b;



Private corporations, however, are ordinarily bound by the principle of estoppel, the same as natural persons.<sup>289</sup> Thus, a corporation is estopped from denying that its agents possess all the authority which it gives them the appearance of having.<sup>290</sup>

Incident to the enlarged powers of married women to deal with others is the capacity to be bound by their conduct when the doctrine of estoppel is necessary for the protection of those who deal with them.<sup>291</sup> This rule, however, is subject to some limitations.<sup>292</sup> When the wife deals in respect to a matter concerning which her common-law disabilities have been removed, she may be bound by estoppel the same as any other person; but where the transaction relates to a matter concerning which her common-law disabilities continue, the doctrine of estoppel cannot be invoked to remove her incapacity.<sup>293</sup> In some jurisdictions, however, she may, under some circumstances, be estopped from asserting the common-law disability of coverture as a defense.<sup>294</sup>

*Phila. M. & T. Co. v. Omaha*, 63 Neb. 280, 93 A. S. R. 442; *Chehalis County v. Hutcheson*, 21 Wash. 82, 75 A. S. R. 818.

<sup>289</sup> *Gunther v. New Orleans C. E. M. A. Ass'n*, 40 La. Ann. 776, 8 A. S. R. 554. See, however, § 157(b), *supra*.

<sup>290</sup> *Hoene v. Pollak*, 118 Ala. 617, 72 A. S. R. 189; *St. Clair v. Rutledge*, 115 Wis. 583, 95 A. S. R. 964.

<sup>291</sup> *Dobbin v. Cordiner*, 41 Minn. 165, 16 A. S. R. 683; *Shivers v. Simmons*, 54 Miss. 520, 28 A. R. 372; *Crenshaw v. Julian*, 26 S. C. 283, 4 A. S. R. 719; *Howell v. Hale*, 5 Lea (Tenn.) 405.

<sup>292</sup> *Jackson v. Torrence*, 83 Cal. 521; *Dobbin v. Cordiner*, 41 Minn. 165, 16 A. S. R. 683.

<sup>293</sup> *Cook v. Walling*, 117 Ind. 9, 10 A. S. R. 17; *Lowell v. Daniels*, 2 Gray (Mass.) 161, 61 A. D. 448; *Dukes v. Spangler*, 35 Ohio St. 119, 127; *Innis v. Templeton*, 95 Pa. 262, 40 A. R. 643; *Stone v. Sledge*, 87 Tex. 49, 47 A. S. R. 65. And see *Williamson v. Jones*, 43 W. Va. 562, 577, 64 A. S. R. 891, 905.

Misrepresentations made after she becomes discoverly may, of course, estop her. *Logan v. Gardner*, 136 Pa. 588, 20 A. S. R. 939.

<sup>294</sup> *Patterson v. Lawrence*, 90 Ill. 174, 32 A. R. 22; *Long v. Crosson*,

**§ 160. Requisites of estoppel.**

(a) **Existence of misrepresentation.** Misrepresentation, as used in the law of estoppel, means "a false impression of some fact or set of facts created upon the mind of one person by another by language, or by language and conduct together, or by conduct alone equivalent to language, where there appears to be no intention to warrant the same."<sup>295</sup> As the term implies, the foundation of the form of estoppel considered in the present article is a misrepresentation, express or implied.<sup>296</sup>

The misrepresentation must be in existence at the time the person to whom it was made acts upon it to his prejudice. If it is withdrawn before a change of position, there is no estoppel.<sup>297</sup>

Ordinarily, the misrepresentation must be the free and intelligent act of the person making it, else he is not bound. Misrepresentation induced by fraud or mistake does not create an estoppel,<sup>298</sup> in the absence of carelessness on his part.<sup>299</sup>

(b) **Misrepresentation of third person.** As a rule, a person

119 Ind. 3, 4 L. R. A. 783; *Lane v. Schlemmer*, 114 Ind. 296, 5 A. S. R. 621; *Newman v. Moore*, 94 Ky. 147, 42 A. S. R. 343; *Brown v. Thomson*, 31 S. C. 436, 17 A. S. R. 40.

<sup>295</sup> Bigelow, *Estop.* (5th Ed.) 556. See, generally, 7 *Current Law*, 1492.

<sup>296</sup> *Baxendale v. Bennett*, 3 Q. B. Div. 525, 47 *Law J. Q. B.* 624; *Sandys v. Hodgson*, 10 *Adol. & E.* 472, 8 *Law J. Q. B.* (N. S.) 344; *Gillett v. Wiley*, 126 Ill. 310, 9 A. S. R. 587; *Blodgett v. Perry*, 97 Mo. 263, 10 A. S. R. 307; *N. Y. Rubber Co. v. Rothery*, 107 N. Y. 310, 1 A. S. R. 882; *Estis v. Jackson*, 111 N. C. 145, 32 A. S. R. 784; *Bynum v. Preston*, 69 Tex. 287, 5 A. S. R. 49.

<sup>297</sup> *Freeman v. Cooke*, 2 *Exch.* 654, 18 *Law J. Exch.* 114; *Sanitary Dist. v. Cook*, 169 Ill. 184, 61 A. S. R. 161.

<sup>298</sup> *McCaskill v. Conn. Sav. Bank*, 60 Conn. 300, 25 A. S. R. 323; *Peters B. & L. Co. v. Lesh*, 119 Ind. 98, 12 A. S. R. 367; *Hazell v. Tipton Bank*, 95 Mo. 60, 6 A. S. R. 22; *Lyndonville Nat. Bank v. Fletcher*, 68 Vt. 81, 54 A. S. R. 874; *Shoufe v. Griffiths*, 4 *Wash.* 161, 31 A. S. R. 910.

<sup>299</sup> See § 160(b), *infra*.

is not estopped by a misrepresentation which he did not either make or authorize.<sup>300</sup> This rule, however, is subject to an important qualification. A man may be estopped by another's unauthorized misrepresentation if, in breach of some duty to the person deceived, he has supplied the person making the misrepresentation with that which was necessary to make it credible.<sup>301</sup> Thus, if the owner of property transfers it to a debtor to enable him to get credit, he invests him with the indicia of ownership, and as against those who, in reliance thereon, give the debtor credit, the true owner is estopped to assert his title.<sup>302</sup> So, if a man stands by in silence and allows his property to be sold by another to an innocent purchaser, he is estopped, as against the latter, to assert his title.<sup>303</sup> And one

<sup>300</sup> *Swan v. North British A. Co.*, 7 Hurl. & N. 657, 31 Law J. Exch. 425; *Fox v. Clifton*, 8 Law J. C. P. (O. S.) 261; *First Nat. Bank v. Cody*, 93 Ga. 127; *St. Louis, A. & T. H. R. Co. v. Belleville*, 122 Ill. 376; *Henry v. Sneed*, 99 Mo. 407, 17 A. S. R. 580; *City Nat. Bank v. Kusworm*, 88 Wis. 188, 43 A. S. R. 380.

If he authorizes a misrepresentation, he may be estopped by it. *Marston v. Kennebec M. L. Ins. Co.*, 89 Me. 266, 56 A. S. R. 412.

<sup>301</sup> *Ewart, Estop.* 20; *McKenzie v. British Linen Co.*, 6 App. Cas. 32; *West v. Jones*, 1 Sim. (N. S.) 205; *Ingham v. Primrose*, 28 Law J. C. P. 294; *Metropolitan L. Ins. Co. v. McCoy*, 124 N. Y. 47, 11 L. R. A. 708.

<sup>302</sup> *Tapp v. Lee*, 3 Bos. & P. 367; *Corbett v. Brown*, 8 Bing. 33; *Graham v. Thompson*, 55 Ark. 296, 29 A. S. R. 40; *Water's Appeal*, 35 Pa. 523, 78 A. D. 354.

To give rise to the estoppel there must be an intent to deceive creditors. *Warner v. Watson*, 35 Fla. 402; *Leete v. State Bank*, 115 Mo. 184; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Kingman v. Graham*, 51 Wis. 232.

<sup>303</sup> *Pickard v. Sears*, 6 Adol. & E. 469; *Lindsay v. Cooper*, 94 Ala. 170, 33 A. S. R. 105; *Ala. G. So. R. Co. v. South & North Ala. R. Co.*, 84 Ala. 570, 5 A. S. R. 401; *Terrell v. Weymouth*, 32 Fla. 255, 37 A. S. R. 94; *Cross v. Weare Com. Co.*, 153 Ill. 499, 46 A. S. R. 902; *Blanchard v. Allain*, 5 La. Ann. 367, 52 A. D. 594; *Hafter v. Strange*, 65 Miss. 323, 7 A. S. R. 659; *Guffey v. O'Relley*, 88 Mo. 418, 57 A. R. 424; *Stevenson v. Saline County*, 65 Mo. 425; *Marines v. Goblet*, 31 S. C. 153, 17 A. S. R.

who sells and delivers goods with the knowledge that they are to be put on sale by the vendee is estopped, as against an innocent purchaser, to assert that the sale was conditional, and that title had not passed to the vendee.<sup>304</sup> He is not thus estopped by the unauthorized misrepresentation of a third person, however, unless he assists in the misstatement.<sup>305</sup>

It is the duty of a person to exercise an appropriate measure of prudence to avoid causing harm to others. He must not omit to do anything which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or do anything which a prudent and reasonable man would not do.<sup>306</sup> To constitute an estoppel there must be a breach of this duty.<sup>307</sup> To create an estoppel by silence, for instance, there must be not only the opportunity, but the apparent duty, to speak.<sup>308</sup> "If, in breach of this

22; *Wampol v. Kountz*, 14 S. D. 334, 86 A. S. R. 765; *Wilkins v. May*, 3 Head (Tenn.) 173; *Henderson v. Overton*, 2 Yerg. (Tenn.) 394, 24 A. D. 492; *Lewis v. Lichty*, 3 Wash. 213, 28 A. S. R. 25.

To create the estoppel, the owner need not be actually present at the sale. *Anderson v. Hubble*, 93 Ind. 573, 47 A. R. 394.

<sup>304</sup> *Lewenberg v. Hayes*, 91 Me. 104, 64 A. S. R. 215; *Eisenberg v. Nichols*, 22 Wash. 70, 79 A. S. R. 917. See, however, *Zuchtman v. Roberts*, 109 Mass. 53, 12 A. R. 663.

<sup>305</sup> *Marschall v. Aiken*, 170 Mass. 3.

<sup>306</sup> *Ewart*, Estop. 30.

<sup>307</sup> *Ramsden v. Dyson*, L. R. 1 H. L. 140; *Bank of Ireland v. Evans' Charities*, 5 H. L. Cas. 389; *Mangles v. Dixon*, 3 H. L. Cas. 702; *Clark v. Eckroyd*, 12 Ont. App. 425; *Leather Mfrs. Bank v. Morgan*, 117 U. S. 96; *Janin v. London & S. F. Bank*, 92 Cal. 14, 27 A. S. R. 82; *Oliver Ditson Co. v. Bates*, 181 Mass. 455, 92 A. S. R. 424; *Scollans v. Rollins*, 173 Mass. 275, 73 A. S. R. 284; *O'Herron v. Gray*, 168 Mass. 573, 60 A. S. R. 411; *Knox v. Eden Musee Am. Co.*, 148 N. Y. S. 441, 51 A. S. R. 700; *Gjerstadengen v. Hartzell*, 9 N. D. 268, 81 A. S. R. 575; *Robb v. Pa. Co.*, 186 Pa. 456, 65 A. S. R. 868; *Tanney v. Tanney*, 159 Pa. 277, 39 A. S. R. 678; *Miller Piano Co. v. Parker*, 155 Pa. 208, 35 A. S. R. 873.

<sup>308</sup> *Polak v. Everett*, 1 Q. B. Div. 673, 45 Law J. Q. B. 369; *Lower Latham Ditch Co. v. Loudon Irr. C. Co.*, 27 Colo. 267, 83 A. S. R. 80; *Green v.*

duty, one person has assisted the misrepresentation of another, —supplied that which has made it credible,—he ought to be estopped, as against the person to whom the harm has been caused," from denying the truth of the misrepresentation.<sup>309</sup> This rule is expressed in the principle "that wherever one of two innocent persons must suffer by the acts of a third, he who enables such third person to occasion the loss must sustain it."<sup>310</sup> If, for example, the drawer of a check leaves spaces in it which may easily be filled in by the holder so as to increase the amount without rendering the paper suspicious in appearance, the drawer is estopped, as against a bona fide transferee of the check, to assert nonliability for the amount so inserted.<sup>311</sup> In some jurisdictions this rule applies only to checks, and not to bills of exchange.<sup>312</sup> In the United States,

Hedenberg, 159 Ill. 489, 50 A. S. R. 178; Morrison v. Caldwell, 5 T. B. Mon. (Ky.) 426, 17 A. D. 84; Stewart v. Matheny, 66 Miss. 21, 14 A. S. R. 538; Allen v. Shaw, 61 N. H. 95; Chapman v. Rochester, 110 N. Y. 273, 6 A. S. R. 366; N. Y. Rubber Co. v. Rothery, 107 N. Y. 310, 1 A. S. R. 822; Hunt v. Reilly, 24 R. I. 68, 59 L. R. A. 206; Williamson v. Jones, 43 W. Va. 562, 64 A. S. R. 891; Priewe v. Wis. S. L. & I. Co., 103 Wis. 537, 74 A. S. R. 904.

<sup>309</sup> Ewart, Estop. 37; Scarf v. Jardine, 7 App. Cas. 357; McKenzie v. British Linen Co., 6 App. Cas. 82; Holton v. Sanson, 11 U. C. C. P. 606; Telegraph Co. v. Davenport, 97 U. S. 369; First Nat. Bank v. Allen, 100 Ala. 476, 46 A. S. R. 80; Graham v. Thompson, 55 Ark. 296, 29 A. S. R. 40; Fannoner v. King, 49 Ark. 299, 4 A. S. R. 49; Hill v. Wand, 47 Ark. 340, 27 A. S. R. 288; Bastrup v. Prendergast, 179 Ill. 553, 70 A. S. R. 128; Moore v. Moore, 112 Ind. 149, 2 A. S. R. 170; Armour v. Mich. Cent. R. Co., 65 N. Y. 111, 122, 22 A. R. 603; Velsian v. Lewis, 15 Or. 539, 3 A. S. R. 184.

<sup>310</sup> Ewart, Estop. 177; Lickbarrow v. Mason, 2 Term R. 63, 1 H. Bl. 357, 6 East, 21; Turner v. Flinn, 72 Ala. 532; State Nat. Bank v. Flathers, 45 La Ann. 75, 40 A. S. R. 216.

<sup>311</sup> Young v. Grote, 4 Bing. 253, 5 Law J. C. P. (O. S.) 165, 12 Moore, 484.

<sup>312</sup> Scholfield v. Londesborough [1894] 2 Q. B. 660, 63 Law J. Q. B. 649, [1895] 1 Q. B. 536, 64 Law J. Q. B. 293, [1896] App. Cas. 514, 65 Law J. Q. B. 593; Bank of Hamilton v. Imperial Bank, 31 Ont. 100.

by the better opinion, it is the rule that where the maker of a negotiable instrument of any sort has himself, by careless execution of the instrument, left room for any alteration to be made, either by insertion, erasure, or clipping, without apparent defacement, he is estopped, as against a bona fide holder, to deny the liability on the instrument as altered.<sup>313</sup>

(c) **Indirect misrepresentation.** A misrepresentation cannot found an estoppel unless it was made directly or indirectly to the person injured.<sup>314</sup> A misrepresentation made to another indirectly through the medium of a third person may found an estoppel, where it was intended to be acted on by others than the one to whom it was directly made.<sup>315</sup> In this case, to create the estoppel, the misrepresentation need not have been intended to be acted upon by some one person in particular. It is enough that a certain class of persons, of whom the per-

<sup>313</sup> *Yocum v. Smith*, 63 Ill. 321, 14 A. R. 120; *Lowden v. Schoharie County Nat. Bank*, 38 Kan. 533; *Blakey v. Johnson*, 13 Bush (Ky.) 197, 26 A. R. 254; *Isnard v. Torres*, 10 La. Ann. 103; *Putnam v. Sullivan*, 4 Mass. 45, 3 A. D. 206; *Weidman v. Symes*, 120 Mich. 657; *Goodman v. Eastman*, 4 N. H. 455; *Van Duzer v. Howe*, 21 N. Y. 531; *Leas v. Walls*, 101 Pa. 57, 47 A. R. 699; *Brown v. Reed*, 79 Pa. 370, 21 A. R. 75; *Zimmerman v. Rote*, 75 Pa. 188. *Contra*, *Columbia v. Cornell*, 130 U. S. 605; *Fordyce v. Kosminski*, 49 Ark. 40, 4 A. S. R. 18; *Walsh v. Hunt*, 120 Cal. 46; *Harvey v. Smith*, 55 Ill. 224; *Cochran v. Nebeker*, 48 Ind. 459; *Knoxville Nat. Bank v. Clarke*, 51 Iowa, 264, 33 A. R. 129; *Burrows v. Klunk*, 70 Md. 451, 14 A. S. R. 371; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 A. R. 67; *Holmes v. Trumper*, 22 Mich. 427, 7 A. R. 661; *Simmons v. Atkinson*, 69 Miss. 862; *Benedict v. Cowden*, 49 N. Y. 396, 10 A. R. 382; *Searles v. Seipp*, 6 S. D. 472.

<sup>314</sup> *Jorden v. Money*, 5 H. L. Cas. 212, 23 Law J. Ch. 865; *Le Lievre v. Gould* [1893] 1 Q. B. 491, 62 Law J. Q. B. 353; *Kinney v. Whiton*, 44 Conn. 262, 26 A. R. 462; *Mills v. Graves*, 38 Ill. 455, 87 A. D. 315; *Simpson v. Pearson*, 31 Ind. 1, 99 A. D. 577; *Maguire v. Selden*, 103 N. Y. 642; *Atkins v. Payne*, 190 Pa. 5; *Holman v. Boyce*, 65 Vt. 318, 36 A. S. R. 861.

<sup>315</sup> *Gregg v. Wells*, 10 Adol. & E. 90, 8 Law J. Q. B. (N. S.) 193; *Brown v. Sims*, 22 Ind. App. 317; *First Nat. Bank v. Marshall & I. Bank*, 108 Mich. 114; *Stevens v. Ludlum*, 46 Minn. 160, 24 A. S. R. 210.

son injured is one, was in the mind of the person making the misrepresentation.<sup>316</sup>

(d) **Misrepresentation of opinion and intention.** The misrepresentation must be of some fact alleged to be at the time existing, as distinguished from a statement of opinion,<sup>317</sup> or a statement of intention as to future acts or a promise.<sup>318</sup> A statement of intention as to future acts may involve a representation of fact, however; as where a note purporting to be signed by a certain person is shown to him by a prospective purchaser of the instrument, and he expresses an intention to pay it at maturity. In this case the expression of an intention to pay constitutes an implied representation that the signature is valid, and it cannot be disputed as against the purchaser.<sup>319</sup>

(e) **Fraudulent intent.** A representation innocently made may found an estoppel. An intention to defraud is not always essential.<sup>320</sup> If a misrepresentation is made personally

<sup>316</sup> *In re Agra & M. Bank*, 2 Ch. App. 391, 36 Law J. Ch. 222; *In re Bahia & S. F. R. Co.*, L. R. 3 Q. B. 584, 37 Law J. Q. B. 176; *Brown v. Sims*, 22 Ind. App. 317; *Irish-American Bank v. Ludlum*, 49 Minn. 255; *Stevens v. Ludlum*, 46 Minn. 160, 24 A. S. R. 210; *Riggs v. Pursell*, 74 N. Y. 370; *Armour v. Mich. Cent. R. Co.*, 65 N. Y. 111, 122, 22 A. R. 603; *Loomis v. Lane*, 29 Pa. 244, 72 A. D. 625.

<sup>317</sup> *Akin v. Kellogg*, 119 N. Y. 441.

<sup>318</sup> *Citizens' Bank v. First Nat. Bank*, L. R. 6 H. L. 352, 43 Law J. Ch. 269; *Jorden v. Money*, 5 H. L. Cas. 185, 23 Law J. Ch. 865; *Merchants' Bank v. Lucas*, 18 Can. Sup. Ct. 704; *McLain v. Buliner*, 49 Ark. 218, 4 A. S. R. 36; *Langdon v. Doud*, 10 Allen (Mass.) 433; *White v. Ashton*, 51 N. Y. 280; *Elliot v. Whitmore*, 23 Utah, 342, 90 A. S. R. 700; *Rorer Iron Co. v. Trout*, 83 Va. 397, 5 A. S. R. 285.

<sup>319</sup> *Perry v. Lawless*, 5 U. C. Q. B. 514; *Preston v. Mann*, 25 Conn. 118; *Krathwohl v. Dawson*, 140 Ind. 1.

<sup>320</sup> *Jorden v. Money*, 5 H. L. Cas. 212, 23 Law J. Ch. 865; *Snell v. Ins. Co.*, 98 U. S. 85; *Gillett v. Wiley*, 126 Ill. 310, 9 A. S. R. 587; *Anderson v. Hubble*, 93 Ind. 570, 47 A. R. 394, 399; *Wampol v. Kountz*, 14 S. D. 334, 86 A. S. R. 765. *Contra*, *McGee v. Kane*, 14 Ont. 234; *Brant v. Va. C. & I. Co.*, 93 U. S. 335; *Boggs v. Merced Min. Co.*, 14 Cal. 367; *Powell v. Rogers*, 105 Ill. 322; *Zuchtmann v. Roberts*, 109 Mass. 53.

or by authority, the person so making or authorizing it is estopped, even though he is not guilty of fraud.<sup>321</sup> If a person, by active means, gives credibility to a misrepresentation made without his authority, he is estopped, notwithstanding that he is innocent of fraud.<sup>322</sup> Thus, if a carrier or warehouseman issues a delivery order or warehouse receipt or bill of lading, and a third person advances money on it on the representation of the holder that he owns the goods described, the representation being given credibility by the holder's possession of the document, the bailee is estopped to deny that it holds the goods, or that the holder owns them, notwithstanding the absence of fraud or knowledge of the misrepresentation.<sup>323</sup> So, if a person, even though innocently, invests another by contract, whether negotiable or otherwise, with the legal title to chattels, he is estopped to deny, as against a bona fide purchaser, that the person so clothed had title.<sup>324</sup>

12 A. R. 663; *Staton v. Bryant*, 55 Miss. 261; *Stevens v. Dennett*, 51 N. H. 324; *Brigham Young Trust Co. v. Wagener*, 12 Utah, 1; *Kingman v. Graham*, 51 Wis. 232.

Fraud may be sufficiently shown by negligence on the part of the person making the misrepresentation. *Sullivan v. Colby*, 18 C. C. A. 193, 71 Fed. 460; *Montgomery v. Keppel*, 75 Cal. 128, 7 A. S. R. 125. *Contra*, *Pitcher v. Dove*, 99 Ind. 175, 178; *Stiff v. Ashton*, 155 Mass. 130; *Brookhaven v. Smith*, 118 N. Y. 640; *Moore v. Brownfield*, 10 Wash. 439.

<sup>321</sup> *West v. Jones*, 1 Sim. (N. S.) 207, 20 Law J. Ch. 362; *Wright v. Snowe*, 2 De Gex & S. 321; *Saderquist v. Ontario Bank*, 14 Ont. 586; *Stevens v. Ludlum*, 46 Minn. 160, 24 A. S. R. 210; *Horn v. Cole*, 51 N. H. 287, 12 A. R. 111; *Blair v. Walt*, 69 N. Y. 113. See, however, *Smith v. Sprague*, 119 Mich. 148, 75 A. S. R. 384.

<sup>322</sup> *Bickerton v. Walker*, 31 Ch. Div. 151, 55 Law J. Ch. 227; *Shaw v. Port Phillip & C. G. Min. Co.*, 13 Q. B. Div. 103, 53 Law J. Q. B. 369.

<sup>323</sup> *Coventry v. Great Eastern R. Co.*, 11 Q. B. Div. 776, 52 Law J. Q. B. 694; *Holton v. Sanson*, 11 U. C. C. P. 606; *Armour v. Mich. Cent. R. Co.*, 65 N. Y. 111, 122. See, however, *Second Nat. Bank v. Walbridge*, 19 Ohio St. 419, 2 A. R. 408.

<sup>324</sup> *Moore v. Moore*, 112 Ind. 152, 2 A. S. R. 170; *Root v. French*, 13 Wend. (N. Y.) 570, 28 A. D. 482.



The only form of estoppel into which fraud necessarily enters is that arising where a misrepresentation made without authority is given credibility by another, not by active means, but only passively, as where one stands by and, without asserting his rights, knowingly suffers another to alter his position in ignorance of those rights.<sup>325</sup> In such cases the person thus standing by in silence must have had actual or virtual knowledge of the other's error, else he is not estopped.<sup>326</sup>

(f) **Carelessness.** Carelessness, accompanied by misrepresentation, sometimes gives rise to an estoppel.<sup>327</sup> In case the misrepresentation is made personally or by authority, carelessness is not a necessary element of estoppel. Whether or not it exists, the estoppel may arise.<sup>328</sup> And the rule is the same in many cases of assisted misrepresentation, i. e., misrepresentation of a third person to which the person estopped has given credibility.<sup>329</sup> In some classes of cases where the misrepresentation is made by one person, and the carelessness occurs on the part of another, however, the latter is estopped.<sup>330</sup> Thus, if a person, through carelessness, allows himself to be tricked into executing a document which he did not intend to execute, he is estopped from asserting the fraud as against one who in innocent reliance on the document has altered his

<sup>325</sup> Ewart, Estop. 88; Pickard v. Sears, 6 Adol. & E. 469; Ramsden v. Dyson, L. R. 1 H. L. 140; Fleming v. Barden, 126 N. C. 450, 127 N. C. 214, 53 L. R. A. 316; Hill v. Epley, 31 Pa. 331, 334.

<sup>326</sup> Mangles v. Dixon, 3 H. L. Cas. 702; Proctor v. Bennis, 36 Ch. Div. 740, 57 Law J. Ch. 11.

<sup>327</sup> Weinstein v. Nat. Bank, 69 Tex. 38, 5 A. S. R. 23.

<sup>328</sup> Burrowes v. Lock, 10 Ves. 470.

<sup>329</sup> In re Bahla & S. F. R. Co., L. R. 3 Q. B. 584, 37 Law J. Q. B. 176; Cornish v. Abington, 4 Hurl. & N. 556, 28 Law J. Exch. 262.

<sup>330</sup> McKenzie v. British Linen Co., 6 App. Cas. 82; Cairncross v. Lorimer, 3 Macq. H. L. Cas. 827, 830; Merchants' Bank v. Lucas, 13 Ont. 520, 15 Ont. App. 573, 18 Can. Sup. Ct. 704; Hardy v. Chesapeake Bank, 51 Md. 562, 34 A. R. 325; Thomson v. Shelton, 49 Neb. 644; Greene v. Smith, 57 Vt. 268.

position.<sup>331</sup> So, if a mortgagee carelessly delivers the title deeds to the mortgagor, who conveys to one who, in reliance on the mortgagor's possession of the documents, believes the property to be unincumbered, the mortgagee is estopped to assert his lien.<sup>332</sup>

**(g) Change of position—Reliance on misrepresentation—Injury.** To give rise to an estoppel, the person asserting it must have changed his position to his prejudice in reliance on the misrepresentation.<sup>333</sup> It is not enough that there might have been a change of position, if in fact there was not.<sup>334</sup> The change must be in the position of the person asserting the estoppel, else the person making the misstatement is not bound.<sup>335</sup> The necessary change in position may result from an omission to act as well as affirmative action.<sup>336</sup>

<sup>331</sup> *Ex parte Swan*, 7 C. B. (N. S.) 431, 30 Law J. C. P. 113; *Blaisdell v. Leach*, 101 Cal. 405, 40 A. S. R. 65; *Charleston v. Ryan*, 22 S. C. 339, 53 A. R. 713.

<sup>332</sup> *Thorpe v. Holdsworth*, L. R. 7 Eq. 147, 38 Law J. Ch. 194; *Newman v. Newman*, 28 Ch. Div. 674, 54 Law J. Ch. 598; *Clarke v. Palmer*, 21 Ch. Div. 124, 51 Law J. Ch. 634.

<sup>333</sup> *Miles v. McIlwraith*, 8 App. Cas. 120, 52 Law J. P. C. 17; *Ex parte Adamson*, 8 Ch. Div. 817, 47 Law J. Bankr. 103; *Wheaton v. North British & M. Ins. Co.*, 76 Cal. 415, 9 A. S. R. 216; *Tolman v. Smith*, 74 Cal. 345; *Davidson v. Jennings*, 27 Colo. 187, 83 A. S. R. 49; *Mills v. Graves*, 38 Ill. 455, 87 A. D. 315; *Thompson v. Thompson*, 9 Ind. 323, 68 A. D. 638; *Nat. Union Bank v. Nat. Mechanics' Bank*, 80 Md. 371, 45 A. S. R. 350; *Klass v. Detroit*, 129 Mich. 35, 95 A. S. R. 407; *De Berry v. Wheeler*, 128 Mo. 84, 49 A. S. R. 538; *Blodgett v. Perry*, 97 Mo. 263, 10 A. S. R. 307; *Lingonner v. Ambler*, 44 Neb. 316; *Rigney v. Rigney*, 127 N. Y. 408, 24 A. S. R. 462; *N. Y. Rubber Co. v. Rothery*, 107 N. Y. 310, 1 A. S. R. 822; *Faison v. Grandy*, 128 N. C. 438, 83 A. S. R. 693; *Bynum v. Preston*, 69 Tex. 287, 5 A. S. R. 49; *Holman v. Boyce*, 65 Vt. 318, 36 A. S. R. 861; *Shakman v. U. S. Credit System Co.*, 92 Wis. 366, 53 A. S. R. 920.

<sup>334</sup> *Davis v. Bank of England*, 2 Bing. 393, 5 Barn. & C. 185.

<sup>335</sup> *Heane v. Rogers*, 9 Barn. & C. 577, 7 Law J. K. B. (O. S.) 285.

<sup>336</sup> *Gordon v. James*, 30 Ch. Div. 249; *Leather Mfrs. Bank v. Morgan*, 117 U. S. 107; *Moyle v. Landers*, 78 Cal. 99, 12 A. S. R. 22; *Continental*

Change of position in reliance on an active misrepresentation works an estoppel, even though the person injured had means of ascertaining the falsity of the statement.<sup>337</sup> This is especially true where, because of the misrepresentation or other means, the person injured neglected to make investigation.<sup>338</sup> Where, however, the misrepresentation is passive,—where no active means are taken to deceive,—then, as a rule, if the person injured has the means of knowledge, he is bound to pursue them. The other party is not estopped under these circumstances,<sup>339</sup> unless, perhaps, he had reasonable ground for anticipating some change in the other's position.<sup>340</sup>

The change in position must ordinarily have occurred upon the faith of the misrepresentation.<sup>341</sup> If the person injured

*Nat. Bank v. Nat. Bank*, 50 N. Y. 575; *Weinstein v. Nat. Bank*, 69 Tex. 38, 5 A. S. R. 23.

<sup>337</sup> *Bloomenthal v. Ford* [1897] App. Cas. 158, 66 Law J. Ch. 253; *Willmott v. Barber*, 15 Ch. Div. 106, 49 Law J. Ch. 792; *Strand v. Griffith*, 97 Fed. 854; *Dodge v. Pope*, 93 Ind. 480; *David v. Park*, 103 Mass. 501.

<sup>338</sup> *Graham v. Thompson*, 55 Ark. 299, 29 A. S. R. 40; *Evans v. Forstall*, 58 Miss. 30.

<sup>339</sup> *Lower Latham Ditch Co. v. Loudon Irr. C. Co.*, 27 Colo. 267, 83 A. S. R. 80; *Morgan v. Farrel*, 58 Conn. 418, 18 A. S. R. 282; *Blodgett v. Perry*, 97 Mo. 263, 10 A. S. R. 307; *Clark v. Parsons*, 69 N. H. 147, 76 A. S. R. 157; *Estis v. Jackson*, 111 N. C. 145, 32 A. S. R. 784; *Fisher's Ex'r v. Mossman*, 11 Ohio St. 42; *Bright v. Allan*, 203 Pa. 394, 93 A. S. R. 769; *Williamson v. Jones*, 43 W. Va. 562, 64 A. S. R. 891; *Kingman v. Graham*, 51 Wis. 232.

<sup>340</sup> *McLean v. Clark*, 21 Ont. 683; *Markham v. O'Connor*, 52 Ga. 183, 21 A. R. 249; *Two Rivers Mfg. Co. v. Day*, 102 Wis. 328.

<sup>341</sup> *Simm v. Anglo-American Tel. Co.*, 5 Q. B. Div. 188; *Graham v. Thompson*, 55 Ark. 296, 29 A. S. R. 40; *First Nat. Bank v. Maxwell*, 123 Cal. 360, 69 A. S. R. 64; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 A. R. 325; *Traders' Nat. Bank v. Rogers*, 167 Mass. 315, 57 A. S. R. 458; *Lincoln v. Gay*, 164 Mass. 537, 49 A. S. R. 480; *Murphy v. Barnard*, 162 Mass. 72, 44 A. S. R. 340; *Clark v. Dillman*, 108 Mich. 625; *Blodgett v. Perry*, 97 Mo. 263, 10 A. S. R. 307; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 A. R. 501; *Gjerstadengen v. Hartzell*, 9 N. D. 268, 81 A. S.

had no knowledge of the misrepresentation,<sup>342</sup> or if he had knowledge of its falsity,<sup>343</sup> or if he did not believe it, and made an independent investigation,<sup>344</sup> there is no estoppel.

The misrepresentation need not have been the sole cause of the change in position. The estoppel may arise, even though other causes also operated to work the change.<sup>345</sup>

Injury must have resulted to the person asserting the estoppel, else it does not arise.<sup>346</sup>

(h) **Ground for anticipating change of position.** To bind a person by estoppel, he must have had reasonable ground for anticipating that the person to whom the misrepresentation was made would change his position in reliance on the false statement.<sup>347</sup> If reasonable ground exists, he is estopped,<sup>348</sup> but not otherwise. Even though he knows that his representation is false or misleading, yet if he has no reasonable ground for thinking that it is to be followed by action on the part of the person to whom it is made, he is not estopped.<sup>349</sup> And even

R. 575; *Burrows v. Grover Irr. Co.* (Tex. Civ. App.) 41 S. W. 822; *Prew v. Wis. S. L. & I. Co.*, 103 Wis. 537, 74 A. S. R. 904.

<sup>342</sup> *Starr v. Newman*, 107 Ga. 395; *Saratoga County Bank v. Pruyn*, 90 N. Y. 250; *Shoufe v. Griffiths*, 4 Wash. 161, 31 A. S. R. 910.

<sup>343</sup> *Cooke v. Eshelby*, 12 App. Cas. 271, 56 Law J. Q. B. 505; *Proctor v. Bennis*, 36 Ch. Div. 740, 57 Law J. Ch. 11; *McLean v. Clark*, 20 Ont. App. 660; *Graham v. Thompson*, 55 Ark. 296, 29 A. S. R. 40; *Cooper v. Great Falls Cotton Co.*, 94 Tenn. 588; *Brothers v. Kaukauna Bank*, 84 Wis. 381, 36 A. S. R. 932.

<sup>344</sup> *Small v. Attwood*, *Younge*, 407, 6 Clark & F. 232; *Royal Ins. Co. v. Byers*, 9 Ont. 120.

<sup>345</sup> *Edgington v. Fitzmaurice*, 29 Ch. Div. 481, 55 Law J. Ch. 650.

<sup>346</sup> *Hambleton v. Cent. Ohio R. Co.*, 44 Md. 551; *Corser v. Paul*, 41 N. H. 24, 77 A. D. 753; *Wright's Appeal*, 99 Pa. 425; *Weinstein v. Jefferson Nat. Bank*, 69 Tex. 50, 5 A. S. R. 23.

<sup>347</sup> *Wheaton v. North British & M. Ins. Co.*, 76 Cal. 415, 9 A. S. R. 216.

<sup>348</sup> *Freeny v. Hall*, 93 Ga. 706; *Stevens v. Ludlum*, 46 Minn. 160, 24 A. S. R. 210; *Two Rivers Mfg. Co. v. Day*, 102 Wis. 328. See, however, *Zuchtmann v. Roberts*, 109 Mass. 53, 12 A. R. 663.

<sup>349</sup> *Jorden v. Money*, 5 H. L. Cas. 212, 23 Law J. Ch. 865; *Nichols v.*

though he is aware that the person to whom the misrepresentation is made contemplates action, yet if he has no reasonable ground for thinking that that person is taking action on the faith of the misrepresentation, he is not estopped.<sup>350</sup>

Peck, 70 Conn. 439, 66 A. S. R. 122; Tillotson v. Mitchell, 111 Ill. 518; Kirchman v. Standard Coal Co., 112 Iowa, 668, 52 L. R. A. 318; Allum v. Perry, 68 Me. 232; Pierce v. Andrews, 6 Cush. (Mass.) 4, 52 A. D. 748; Clark v. Dillman, 108 Mich. 625; First Nat. Bank v. Marshall & L. Bank, 108 Mich. 114; Bright v. Allan, 203 Pa. 394, 93 A. S. R. 769; Kingman v. Graham, 51 Wis. 232. See, however, Horn v. Cole, 51 N. H. 297, 12 A. R. 111.

<sup>350</sup> De Berry v. Wheeler, 128 Mo. 84, 49 A. S. R. 538.

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